IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

VICKI HAYMAN,

Plaintiff,

v.

PROVIDER MEDICAL,
PROVIDER MEDICAL GROUP HEALTH PLANS,
PROVIDER MEDICAL TRUST,
an Oklahoma Trust,
PROVIDER MEDICAL TRUST MEDICAL EXPENSE PLAN,
PROVIDER MEDICAL PLAN AND TRUST,
and
JOHNSON BROKERS AND ADMINISTRATORS, INC.,
an Oklahoma Corporation,

Defendants.

Case No. 99-CV-0503H(J)

STIPULATION OF DISMISSAL OF PLAINTIFF'S CLAIMS WITH PREJUDICE

Pursuant to Rule 41(a)(2) of the Federal Rules of Criminal Procedure, the Plaintiff, Vicki Hayman, hereby dismisses with prejudice all claims against all above referenced Defendants.

Dated this 20th day of April, 2000.

Donald Hopkins, OBA #4356

Mike Jones by DHH

Mike Jones, OBA # 4821
Alan Souter, OBA# 15846
JONES LAW OFFICE

Attorneys for Plaintiff, Vicki Hayman

T. Gene Monroe

Ronald A. White, OBA #12037
T. Gene Monroe II, OBA #16112

Attorneys for Defendants

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SONDRA LYNN REYMER, Plaintiff, v. DILLARD'S INC., a Delaware corporation, Defendant.	)	ENTERED ON DOCKET DATE APR 20 2000 99-CV-293-H ✓ FILED APR 20 2000 U.S. DISTRICT COURT

ORDER

This matter comes before the Court on Defendant's Motion to Dismiss (Docket # 8) and Plaintiff's Motion to Dismiss Without Prejudice (Docket # 16). The Court held a hearing on this matter on April 11, 2000.

Plaintiff's Motion to Dismiss (Docket # 16) is hereby granted, and the matter is dismissed without prejudice. Defendant's Motion is rendered moot by this Order.

IT IS SO ORDERED.

This 19TH day of April, 2000.

Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KENNETH B. BOWLINE,	)	ENTERED ON DOCKET
	)	
Plaintiff-Appellant,	)	DATE APR 20 2000
	)	
v.	)	99-CV-487-H(M)
	)	
UNITED STATES, ex rel. BRUCE BABBITT, Secretary of the United States Department of the Interior,	)	FILED
	)	APR 20 2000
Defendant-Appellee.	)	U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court on Plaintiff-Appellant's complaint appealing the ruling of the Secretary of the Interior. The Court duly considered the issues and rendered a decision in accordance with the order dated April 19, 2000.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Defendant and against Plaintiff.

IT IS SO ORDERED.

This 19TH day of April, 2000.

Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRUCE N. STEVENS,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	**Case No. 99-CV-1016-H(M)**
BAKER HUGHES, INCORPORATED, A Delaware Corporation, d/b/a BAKER PETROLITE,	)	
	)	
	)	
Defendant.	)	

ORDER DISMISSING CASE WITH PREJUDICE

UPON MOTION of the Plaintiff, Bruce N. Stevens, the Plaintiff's Motion to Dismiss With Prejudice came on before the Court for consideration this Court having reviewed the pleadings on file herein, and the Court finds that the Application should be granted.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion to Dismiss With Prejudice is hereby granted, and the above styled and numbered case shall be dismissed with prejudice to Plaintiff to refile.

Dated this 19TH day of April, 2000.

Judge of the District Court

Robert W. Giles OBA #15550
Attorney for Plaintiff
505 East Main Street
Jenks, OK. 74037
918-299-3900

SAV

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN WINTON and EVELYN WINTON Plaintiffs,	)	
v.	)	**Case No. 97-CV-841-J**
BOARD OF COUNTY COMMISSIONERS OF TULSA COUNTY, OKLAHOMA, et al; Defendants.	)	

STIPULATION OF DISMISSAL

Plaintiffs, John and Evelyn Winton, and defendant Wexford Health Sources, Inc., through their respective counsel, hereby stipulate to the dismissal of plaintiffs' claims against Wexford with prejudice, pursuant to Fed. R. Civ. P. 41(a)(1)(ii).

Dated this 12th day of April, 2000.

Steven A. Novick
1717 S. Cheyenne Avenue
Tulsa, OK 74119-4611
Tel. 918-599-8123

Attorney for the Plaintiffs

Bob L. Latham, Jr.
Latham, Stall, Wagner, Steele & Lehman
1437 S. Boulder, Suite 820
Tulsa, OK 74119
Tel. 918-382-7523

Attorney for Defendant Wexford

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CJ

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEBRA R. TERRY, Plaintiff,	)	
vs.	)	**No. 99-CV-125-E**
BOARD OF COUNTY COMMISSIONERS OF OTTAWA COUNTY and **BEVERLY STEPP,** in her official capacity as Court Clerk of Ottawa County, Defendants.	)	

JUDGMENT

Plaintiff's Application to Deem Motion for a Supplemental Award of Attorney's Fees Confessed and for Entry of Judgment for Supplemental Attorney's Fees is granted. The Court finds plaintiff's request for supplemental attorney's fees and litigation expenses in the amount of $3,459.50 and $35.00, respectively, to be reasonable and necessary.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that plaintiff Debra R. Terry be awarded judgment for supplemental attorney's fees and litigation expenses against the defendants Board of County Commissioners of Ottawa County and Beverly Stepp in her official capacity as Court Clerk of Ottawa County in the amount of $3,494.50, with post-judgment interest thereon at the prevailing state post-judgment interest rate as provided in 12 O.S. §727, which is 8.73% for 2000.

JAMES O. ELLISON
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FIRST NETWORK MANAGEMENT CORP., an Ohio corporation, et al.,	)	
Plaintiffs,	)	
v.	)	**Case No. 99-CV-028 M**
WILLIAM B. RICHMOND, a/k/a BRIAN RICHMOND, et al.,	)	
Defendants.	)	
AND	)	
HIS AND HER TRUCKING LTD. CO., et al.,	)	
Plaintiffs,	)	
vs.	)	**Case transferred to United States District Court for the Northern District of Oklahoma Case No. 99-CV-028 M from the United States District Court for the Northern District of Ohio-Eastern District Case No. 1:98CV2945**
NETWORK TRUCKING CORP. and SCOTT SIMONETTA,	)	
Defendants.	)	

ORDER DISMISSING ALL
CAUSES OF ACTION WITH PREJUDICE

THIS MATTER, coming before the undersigned, pursuant to the joint motion of the Plaintiffs and the Defendants to dismiss their respective claims and causes of action with prejudice, and the Court finding that such motion is reasonable and should be granted;

IT IS THEREFORE ORDERED that Plaintiffs' and Defendants' respective claims and causes of action be dismissed with prejudice.

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DATED this 18th day of April, 2000.

Frank H. McCarthy

Frank H. McCarthy
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD K. LEE, et al.,

Plaintiffs,

v

IRA MONAS,

Defendant.

Case No. 99CV0391K (E)
Judge Terry C. Kern

DEFAULT JUDGMENT

ON this 19 day of April, 2000, comes on for consideration the Application of the Plaintiffs, Richard K. Lee; Daniel P. Provost; Jorg Schaffner; Ed Baffico; John T. Moroney; Catherine I. Moroney; Carol L. McIntosh; William D. Bulick; Betty McIntosh; Earl Malcolm Murphey; Kenneth E. Wiley; Mayumi Wiley; Bernie O. Achleithner; Emma C. Achleithner; Roy A. Zimmerman; Michael J. Passineau; Amit Zemach; Michelle Tenam-Zemach; Alf Joel Zemach; Small Company Fund A, L.L.C., a Colorado limited liability company; New Horizon Fund, L.L.C., a Colorado limited liability company; Frederick Forte, Jr.; John J. Casabianca; Barbara L. Casabianca; Roger Rippens; Joseph D. Lewis; Lonnie W. Ayers; Sandra R. Ayers; Donald Weiss; Jeff Merrill; Warren Phillips, Jr.; Glenda Phillips; Bruce A. Johnson; Alfred E. Lori; Richard A. Woolf; Marion L. Brittain; Zander Westendarp, f/k/a Fred J. Westendarp; Zander Westendarp, f/k/a Fred J. Westendarp, Trustee FBO Fred Westendarp, M.D., Ltd. Profit Sharing Plan UA DTD 7/1/89; Sandra Edwards; Ernest S. Schuster; Patrick V. Scott; Kenneth J. Newman, Trustee of the Newman Family Trust U/A DTD 06/26/95; Wayne S. Wharton; Christopher Schuster; Michael Borstein; Leon Abramson;

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Don A. Yeargin, II; Jacqueline G. Yeargin; Michael T. Pudelko; Terry E. Shapiro; and Carmelita Shapiro, for default judgment against the Defendant, Ira Monas. THE COURT, having examined the pleadings, files and records of the Court, FINDS that the Defendant, Ira Monas, having been duly served to appear and answer herein, has wholly failed and refused to do so. THE COURT FURTHER FINDS that the material allegations of the Second Amended Complaint are deemed admitted. THE COURT FURTHER FINDS that the Plaintiffs have provided satisfactory evidence and proof to the Court of the nature and extent of their damage.

THE COURT FURTHER FINDS that, pursuant to a Settlement Agreement between the Plaintiffs, among others, and Firamada, Inc., the Plaintiffs are to receive partial compensation for their damages as set forth below from Firamada, Inc., pursuant to an installment payment plan. Such Settlement Agreement is a compromise or settlement for the same injury to the Plaintiffs asserted herein against the Defendant, Ira Monas, and such liability is joint and several between said Defendant and Firamada, Inc.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the above Plaintiffs, and each of them, have and recover judgment against the Defendant, Ira Monas, for the amounts herein set forth as actual damages:

Plaintiff(s)	***Total Actual Damages***
Richard K. Lee	$ 19,953.75
Daniel P. Provost	$ 26,063.89
Jorg Schaffner	$ 9,092.35

Plaintiff(s)	*Total Actual Damages*
Ed Baffico	$ 22,163.00
John T. Moroney	$ 29,759.31
Catherine I. Moroney	$ 7,855.00
Carol L. McIntosh	$ 18,025.00
William D. Bulick (Carol L. McIntosh)	$ 33,073.10
Betty McIntosh (Carol L. McIntosh)	$ 6,769.10
Carol L. McIntosh (Lee McIntosh)	$ 3,230.40
Earl Malcolm Murphey	$ 70,356.12
Kenneth E. Wiley Mayumi Wiley	$ 1,576.15
Bernie O. Achleithner	$ 87,504.40
Emma C. Achleithner	$ 67,412.50
Roy A. Zimmerman	$ 8,999.26
Michael J. Passineau	$ 8,537.75
Amit Zemach & Michelle Tenam-Zemach	$ 16,414.85
Michelle Tenam-Zemach	$ 15,402.30
Amit Zemach, ALF Joel Zemach (a minor)	$ 9,937.50
Small Company Fund A, L.L.C.	$ 54,539.74
New Horizon Fund, L.L.C.	$ 41,367.72
Frederick Forte, Jr.	$ 29,868.87
John J. Casabianca Barbara L. Casabianca	$ 40,267.70
Roger Rippens	$ 17,456.00
Joseph D. Lewis	$ 17,974.67
Lonnie W. Ayers Sandra R. Ayers	$ 7,115.04
Donald Weiss	$ 9,170.00
Jeff Merrill	$ 6,990.99
Warren H. Phillips, Jr. Glenda Phillips	$ 5,310.09

Plaintiff(s)	*Total Actual Damages*
Bruce A. Johnson	$ 5,473.48
Alfred E. Lori	$ 1,663.90
Richard A. Woolf	$ 3,224.00
Marion L. Brittain (Mr.)	$ 53,426.18
Zander Westendarp, f/k/a Fred J. Westendarp	$ 33,205.20
Zander Westendarp, f/k/a Fred J. Westendarp, Trustee FBO Fred Westendarp, M.D., Ltd. Profit Sharing Plan UA DTD 7/1/89	$ 10,084.96
Sandra Edwards	$ 2,769.50
Ernest S. Schuster	$ 14,632.43
Patrick V. Scott	$ 16,284.96
Kenneth J. Newman, Trustee of the Newman Family Trust U/A DTD 06/26/95	$ 8,888.45
Wayne S. Wharton	$ 5,877.75
Christopher Schuster	$ 2,604.35
Michael Borstein	$ 119,088.49
Leon Abramson	$ 30,868.50
Don A. Yeargin, II Jacqueline G. Yeargin	$ 6,251.50
Michael T. Pudelko	$ 10,070.00
Terry E. Shapiro Carmelita Shapiro	$ 13,833.00
TOTAL	$ 1,030,433.20

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the above Plaintiffs further recover judgment against the Defendant, Ira Monas, for total punitive damages in the amount of $2,060,866.40, to be divided among the Plaintiffs in the same proportion as their share of the actual damages as set forth below:

Plaintiff(s)	*Total Punitive Damages*
Richard K. Lee	$ 39,907.50
Daniel P. Provost	$ 52,127.78
Jorg Schaffner	$ 18,184.69
Ed Baffico	$ 44,326.00
John T. Moroney	$ 59,518.63
Catherine I. Moroney	$ 15,710.01
Carol L. McIntosh	$ 36,049.99
William D. Bulick (Carol L. McIntosh)	$ 66,146.21
Betty McIntosh (Carol L. McIntosh)	$ 13,538.20
Carol L. McIntosh (Lee McIntosh)	$ 6,460.80
Earl Malcolm Murphey	$ 140,712.25
Kenneth E. Wiley Mayumi Wiley	$ 3,152.30
Bernie O. Achleithner	$ 175,008.80
Emma C. Achleithner	$ 134,824.99
Roy A. Zimmerman	$ 17,998.51
Michael J. Passineau	$ 17,075.49
Amit Zemach & Michelle Tenam-Zemach	$ 32,829.70
Michelle Tenam-Zemach	$ 30,804.59
Amit Zemach, ALF Joel Zemach (a minor)	$ 19,875.00
Small Company Fund A, L.L.C.	$ 109,079.47
New Horizon Fund, L.L.C.	$ 82,735.44
Frederick Forte, Jr.	$ 59,737.74
John J. Casabianca Barbara L. Casabianca	$ 80,535.40
Roger Rippens	$ 34,912.00
Joseph D. Lewis	$ 35,949.34
Lonnie W. Ayers Sandra R. Ayers	$ 14,230.08
Donald Weiss	$ 18,340.00

Plaintiff(s)	*Total Punitive Damages*
Jeff Merrill	$ 13,981.99
Warren H. Phillips, Jr. Glenda Phillips	$ 10,620.18
Bruce A. Johnson	$ 10,946.95
Alfred E. Lori	$ 3,327.80
Richard A. Woolf	$ 6,448.00
Marion L. Brittain (Mr.)	$ 106,852.36
Zander Westendarp, f/k/a Fred J. Westendarp	$ 66,410.41
Zander Westendarp, f/k/a Fred J. Westendarp, Trustee FBO Fred Westendarp, M.D., Ltd. Profit Sharing Plan UA DTD 7/1/89	$ 20,169.93
Sandra Edwards	$ 5,538.99
Ernest S. Schuster	$ 29,264.86
Patrick V. Scott	$ 32,569.91
Kenneth J. Newman, Trustee of the Newman Family Trust U/A DTD 06/26/95	$ 17,776.91
Wayne S. Wharton	$ 11,755.50
Christopher Schuster	$ 5,208.70
Michael Borstein	$ 238,176.99
Leon Abramson	$ 61,737.00
Don A. Yeargin, II Jacqueline G. Yeargin	$ 12,503.01
Michael T. Pudelko	$ 20,140.00
Terry E. Shapiro Carmelita Shapiro	$ 27,666.00
TOTAL	$ 2,060,866.40

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the amounts awarded pursuant to this Judgment shall bear interest at the rate of 6.191 %, as provided by law, from date of Judgment until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all payments actually made to, and received by, each of such Plaintiffs pursuant to the Settlement Agreement referenced above shall be credited against the Judgment herein in favor of each such Plaintiff and against the Defendant, Ira Monas.

DATED this 19 day of April, 2000.

Terry C. Kern
UNITED STATES DISTRICT JUDGE

APPROVED

Cleve Powell

Cleve W. Powell — OBA #11609
BRACKEN, MORRIS & POWELL, L.L.P.
1223 E. Highland Ave., Ste. 311
Ponca City, OK 74601-4653
(580) 762-3100
(580) 762-3169 [facsimile]
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NATOSHA ANN JOHNSON,

Plaintiff,

vs.

MICHAEL ANDREWS;
NANCY GRAHAM;
PRISON HEALTH SERVICES CO.,

Defendants.

No. 00-CV-005 B (E)

ORDER

On January 4, 2000, Plaintiff submitted for filing a civil rights complaint pursuant to 42 U.S.C. § 1983 along with a motion for leave to proceed *in forma pauperis*. By order entered February 14, 2000, the Court granted Plaintiff leave to proceed *in forma pauperis* and advised Plaintiff that this action could not proceed unless she paid an initial partial filing fee of $2.67 by March 13, 2000. Plaintiff was further advised that "unless by [March 13, 2000] she has either (1) paid the initial partial filing fee, or (2) shown cause in writing for the failure to pay, this action will be subject to dismissal without prejudice to refiling . . . ." (#3). To date, Plaintiff has neither submitted the initial partial filing fee nor shown cause in writing for failing to do so. Further, on February 18, 2000, Plaintiff's copy of the Order entered February 14, 2000, was returned to the Court, marked "NIC" (Not In Custody). To date, Plaintiff has failed to provide the Court with an updated address.

Because Plaintiff has not paid the initial partial filing fee in compliance with the Court's Order of February 14, 2000, and has failed to inform the Court of her updated address, the Court

finds that this action may not proceed and should be dismissed without prejudice for failure to prosecute.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's civil rights Complaint is **dismissed without prejudice** for lack of prosecution.

SO ORDERED THIS 18th day of April, 2000.

THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:

COMMERCIAL FINANCIAL SERVICES, INC. and CF/SPC NGU, INC.,

Debtors.

WILLIM KUNTZ, III,

Appellant,

vs.

FLEET BANK, FLEETBANKSHARES, COMMERCIAL FINANCIAL SERVICES, INC., and CF/SPC NGU, INC.,

Appellees.

District Court Case Nos.
99-CV-926-K(J)
~~99-CV-928-H(J)~~
99-CV-929-B(J)

Bankruptcy Case Nos.
98-05162-R
98-05166-R

ORDER

Appellant has filed with this Court three appeals from decisions of the bankruptcy court in this district. The bankruptcy court has advised Appellant and this Court of several deficiencies in connection with Appellant's appeals. Chief among these deficiencies are Appellant's failure to designate the record on appeal pursuant to Fed. R. Bank. P. 8006, and his failure to pay the requisite fee pursuant to Fed. R. Bank. P. 8001.

The Court previously directed Appellant to show cause why the three appeals docketed in this court as 99-CV-926-K(J), 99-CV-928-H(J) and 99-CV-929-B(J) should not be dismissed as a result of the uncured deficiencies noted by the bankruptcy court.

The Court issued its first show cause Order on March 10, 2000 and required a written response from Appellant on or before March 20, 2000. [Doc. No. 3]. To date, the Court has received no response from Appellant to the Court's first show cause order.

On March 14, 2000, the Court Clerk discovered for the first time that Appellant had filed a document in November 1999. When the document was filed in November, the document did not have a case number on it. On November 18, 1999, the Court Clerk mailed a letter to Appellant requesting that he designate the appropriate case number. The Court Clerk received a response on March 14, 2000 and filed the document in this case on March 14, 2000. [Doc. No. 4]. The document is titled "Exhibits & Prior Affidavit supporting Notice of Motion and Motion to Consolidate Appeals, Proceed on a Single Filing Fee, Proceed on Limited Question of Standing, for an Extension Time to Designate and File the Record and for a Limited Stay Pending Appeal." The document is nothing other than a compilation of various exhibits. As its title suggests, the exhibits are in support of a notice and a motion. The Court has never received from Appellant a notice or motion in this case.

On April 3, 2000, the Court issued a second show cause order, extending Appellant's response time to the Court's first show cause order. [Doc. No. 5]. Appellant was given until April 14, 2000 to file a written brief with the Court explaining why the Court should not dismiss the three appeals as a result of the uncured deficiencies noted by the bankruptcy court. No brief has been filed in response to this second order of the Court.

This appeal is hereby dismissed due to Appellant's failure to designate the record on appeal pursuant to Fed. R. Bank. P. 8006; his failure to pay the requisite filing fee pursuant to Fed. R. Bank. P. 8001; his failure to comply with this Court's prior orders; and his failure to timely prosecute this appeal.

IT IS SO ORDERED.

Dated this 17th day of April 2000.

Thomas R. Brett
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LISA S. KETCHER, natural mother and legal guardian of KYLE KETCHER, a minor child,	)	
Plaintiff,	)	
v.	)	**Case No. 99-CV-306-K (M)**
STATE OF OKLAHOMA ex rel. STATE BOARD OF EDUCATION; STATE DEPARTMENT OF EDUCATION; LOCUST GROVE INDEPENDENT SCHOOL DISTRICT # 17; and JOHN COONS,	)	
Defendants.	)	

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised by Plaintiff's attorney on April 11, 2000, that the parties have reached an agreement, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to N.D. LR 41.0.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED THIS 19 DAY OF APRIL, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE APR 19 2000

F I L E D

APR 19 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN RE:

COMMERCIAL FINANCIAL SERVICES, INC. and CF/SPC NGU, INC.,

Debtors.

WILLIM KUNTZ, III,

Appellant,

vs.

FLEET BANK, FLEETBANKSHARES, COMMERCIAL FINANCIAL SERVICES, INC., and CF/SPC NGU, INC.,

Appellees.

District Court Case Nos.
99-CV-926-K(J)
99-CV-928-H(J)
99-CV-929-B(J)

Bankruptcy Case Nos.
98-05162-R
98-05166-R

ORDER

Appellant has filed with this Court three appeals from decisions of the bankruptcy court in this district. The bankruptcy court has advised Appellant and this Court of several deficiencies in connection with Appellant's appeals. Chief among these deficiencies are Appellant's failure to designate the record on appeal pursuant to Fed. R. Bank. P. 8006, and his failure to pay the requisite fee pursuant to Fed. R. Bank. P. 8001.

The Court previously directed Appellant to show cause why the three appeals docketed in this court as 99-CV-926-K(J), 99-CV-928-H(J) and 99-CV-929-B(J) should not be dismissed as a result of the uncured deficiencies noted by the bankruptcy court.

The Court issued its first show cause Order on March 10, 2000 and required a written response from Appellant on or before March 20, 2000. [Doc. No. 3]. To date, the Court has received no response from Appellant to the Court's first show cause order.

On March 14, 2000, the Court Clerk discovered for the first time that Appellant had filed a document in November 1999. When the document was filed in November, the document did not have a case number on it. On November 18, 1999, the Court Clerk mailed a letter to Appellant requesting that he designate the appropriate case number. The Court Clerk received a response on March 14, 2000 and filed the document in this case on March 14, 2000. [Doc. No. 4]. The document is titled "Exhibits & Prior Affidavit supporting Notice of Motion and Motion to Consolidate Appeals, Proceed on a Single Filing Fee, Proceed on Limited Question of Standing, for an Extension Time to Designate and File the Record and for a Limited Stay Pending Appeal." The document is nothing other than a compilation of various exhibits. As its title suggests, the exhibits are in support of a notice and a motion. The Court has never received from Appellant a notice or motion in this case.

On April 3, 2000, the Court issued a second show cause order, extending Appellant's response time to the Court's first show cause order. [Doc. No. 5]. Appellant was given until April 14, 2000 to file a written brief with the Court explaining why the Court should not dismiss the three appeals as a result of the uncured deficiencies noted by the bankruptcy court. No brief has been filed in response to this second order of the Court.

This appeal is hereby dismissed due to Appellant's failure to designate the record on appeal pursuant to Fed. R. Bank. P. 8006; his failure to pay the requisite filing fee pursuant to Fed. R. Bank. P. 8001; his failure to comply with this Court's prior orders; and his failure to timely prosecute this appeal.

IT IS SO ORDERED.

Dated this 19 day of April 2000.

Terry C. Kern
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MONTE STITHEM, et al.,

Plaintiffs,

v.

SIMMONS FOODS, INC.,

Defendant.

ENTERED ON DOCKET

DATE APR 19 2000

No. 98-CV-553-K

FILED

APR 19 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised that the parties to this action have reached an agreement in the above-captioned matter, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to N.D. LR 41.0.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 18 day of April, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE APR 19 2000

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 99CV1072K(E)
	)	
MICHAEL G. WILLIAMSON, A/K/A MIKE WILLIAMSON,	)	
	)	
Defendant.	)	

FILED
APR 18 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 18 day of April, 2000, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Michael G. Williamson, a/k/a Mike Williamson, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Michael G. Williamson, a/k/a Mike Williamson, filed herein his Waiver of Service of Summons on February 18, 2000. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Michael G. Williamson, a/k/a Mike Williamson, for the principal amounts of $2,195.53, $2,823.49, and $2,211.56, plus accrued interest of $1,842.95, $2,031.15, and $1,723.90 respectively, plus interest thereafter at the rate of 9.13 percent, 8 percent, and 8 percent per annum respectively until judgment, plus filing fees in the amount of $150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 6.197 percent per annum until paid, plus costs of this action.

Terry C Kern
United States District Judge

Submitted By:

Phil Pinnell
PHIL PINNELL, OBA # 7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3880
(918)581-7463

PEP/dlo

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	) **CIVIL ACTION NO. 96-CV-758-E**
	)
ONE PARCEL OF REAL PROPERTY KNOWN AS: 16328 SOUTH 43rd EAST AVENUE, BIXBY, TULSA COUNTY, OKLAHOMA AND ALL BUILDINGS, APPURTENANCES, AND IMPROVEMENTS THEREON,	)
	)
Defendant.	)

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture as to the defendant properties and all entities and/or persons interested in the defendant properties, the Court finds as follows:

The verified Complaint for Forfeiture *In Rem* was filed in this action on the 19th day of August, 1996, alleging that the defendant real property was subject to forfeiture pursuant to 21 U.S.C. § 881(a)(7), because it was used, or intended to be used, to commit, or to facilitate the commission of, a violation of the drug prevention an control laws of the United States.

Warrant of Arrest and Notice *In Rem* was issued on the 16th day of September 1996, by this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant real property and for publication in the Northern District of Oklahoma.

An Amended Complaint for Forfeiture *In Rem* was filed in this action on the 7th day of March 1997, alleging that the defendant real property, buildings, appurtenances and improvements are subject to forfeiture pursuant to 21 U.S.C. § 881(a)(7), because they were used, or intended to be used, to commit, or to facilitate the commission of, a violation of the drug prevention an control laws of the United States.

Amended Warrant of Arrest and Notice *In Rem* was issued on the 12th day of March 1997, by this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant properties and for publication in the Northern District of Oklahoma.

The United States Marshals Service personally served a copy of the Amended Complaint for Forfeiture *In Rem* and the Amended Warrant of Arrest and Notice *In Rem* on the defendant properties on May 13, 1997.

Mark Alan Scott, Amy Black, Ozella Scott and Dennis Semler, Tulsa County Treasurer were determined to be the only individuals with possible standing to file a claim to the defendant properties, and, therefore the only individuals to be served with process in this action. United States Marshals Forms reflecting personal service on the potential claimants are on file herein.

All persons and/or entities interested in the defendant properties were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice *In Rem*, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Amended Complaint within twenty (20) days after filing their respective claim(s).

No claims or answers have been filed of record in this action with the Clerk of the Court, in respect to the defendant properties, and no persons or entities have plead or otherwise defended in this suit as to said defendant properties, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the defendant properties and all persons and/or entities interested therein, save and except Mark Allen Scott, who filed his Stipulation for Forfeiture herein on May 16, 1997; Dennis Semler, Tulsa County Treasurer, who filed his Answer herein on December 26, 1996; and Ozella Scott, whose interest in the defendant properties was ordered forfeited by the April 5, 2000, Order of the Court.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant properties are located, on April 17 and 24, and May 1, 1997. Proof of Publication was filed May 20, 1997.

Mark Allen Scott executed and filed his Stipulation for Forfeiture herein on May 16, 1997, wherein he consented to the forfeiture of his right, title and interest to the above described defendant properties. Mark Alan Scott further stipulated that the above described defendant properties are subject to forfeiture pursuant to 21 U.S.C. § 881(a)(7) because they were used, or were intended to be used, to commit or to facilitate the commission of, a violation of drug prevention an control laws of the United States.

On December 26, 1996, Dennis Semler, Tulsa County Treasurer filed his answer herein. The Government acknowledged the claim of Dennis Semler, Tulsa County

Treasurer, and stipulated to the payment of any unpaid ad valorem taxes on the defendant real property which are due and payable on or before the date of entry of a judgment of forfeiture.

The Court entered an Order on April 5, 2000, granting the Government's Motion for Summary judgment as to the interest of Ozella Scott.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described defendant properties:

A. **SURFACE RIGHTS ONLY IN AND TO:**

The South 211 feet of the North 422 feet of the East 560 feet of the West Half of the Southwest Quarter of the Northeast Quarter (W/2 SW/4 NE/4) of Section 28, Township 17 North, Range 13 East of the Indian Base and Meridian, Tulsa County, State of Oklahoma, according to the U. S. Government Survey thereof, a/k/a 16328 South 43rd East Avenue, Bixby, Oklahoma 74008;

B. **1971 12 x 60 Hillcrest Mobile Home located on the real property described at "A" above;**

C. **One 8 x 16 Roadrunner storage building; one 8 x 20 Roadrunner storage building located on the real property described at "A" above**;

be, and they hereby are, forfeited to the United States of America for disposition according to law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the United States Marshals Service shall distribute the proceeds of the sale of the defendant properties as follows:

1) First, from the sale of the defendant properties, payment to the United States of America of all expenses of forfeiture of the defendant properties, including, but not limited to expenses of seizure, custody, advertising, and sale;

2) Second, from the sale of the defendant real property, any unpaid ad valorem taxes on the defendant real property which are due and payable on or before the date of entry of a judgment of forfeiture;

3) The remaining proceeds from the sale of the defendant properties shall be deposited in the asset forfeiture fund according to law.

Entered this 18th day of April, 2000.

JAMES O. ELLISON
Senior Judge of the United States District Court
for the Northern District of Oklahoma

SUBMITTED BY:

CATHERINE J. DEPEW, OBA #3836
Assistant United States Attorney
333 W. 4th Street, Suite 3460
Tulsa, OK 74103
(918) 581-7463

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BIENEK FAMILY TRUST, CAROLE J. BLEVINS, PATSY CLARK, NORMA COBLE, JEAN DICKSON, ALFRED S. DODSON, FLORA DODSON, SUE DOYLE, MICHAEL W. HERRING, RANDALL M. HURST, HERB V. KENNICUT, KENNETH D. KLINGER, SHIRLEY A. KLINGER, JOHN W. KUBERSKEY, HERMA LANGWELL, AARON K. McCARTHER, THOMAS G. MOORE, MILDRED J. PATTERSON, CLETIS M. ROPER, ELVIN D. ROPER, JERRY D. SAVAGE, RUDY L. TEVEBAUGH, and GERTRUDE M. WHITE,

Plaintiff(s),

vs.

ROYAL INDEMNITY COMPANY, ROYAL SPECIALTY UNDERWRITING INC., and PRIME ATLANTIC, INC.,

Defendant(s).

FILED

APR 18 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-1117-K(J)

ENTERED ON DOCKET

DATE APR 18 2000

REPORT AND RECOMMENDATION

Defendants removed this case from state court on December 27, 1999. Plaintiffs filed a Motion to Remand the action to state court on January 10, 2000. [Doc. No. 11-1]. Defendants filed a Response and a Supplemental Response to the Motion to Remand. Defendants additionally filed an Amended Notice of Removal. [Doc. No. 30-1]. By minute order dated February 23, 2000, the District Court referred the Motion to Remand to the undersigned United States Magistrate Judge.

Plaintiffs are citizens of the state of Oklahoma. Defendants are citizens of the states of Delaware, North Carolina, Georgia, and Florida. Defendants assert that this Court has subject matter jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1332(a), which confers jurisdiction in federal courts when all parties are diverse and the amount in controversy exceeds $75,000. Plaintiffs assert, in their motion to remand, that the requisite jurisdictional amount of $75,000 is not met.

The Magistrate Judge has reviewed the case file, the briefs, and the case law referenced by the parties. The Magistrate Judge recommends that considering the facts and issues in this case, the District Court **DENY** Plaintiffs' Motion to Remand.

I. SUMMARY OF THE PLEADINGS

Plaintiffs filed an action in Tulsa County District Court. Plaintiffs sued Defendants asserting that Defendants raised over $40,000,000 from investors throughout the country for the Alliance Leasing program. Plaintiffs claim that the program was a fraud, and they assert causes of action against Defendants based on common law fraud and Oklahoma security law. Defendants removed the action on December 27, 1999. [Doc. No. 1-1]. Defendants assert that all of the Defendants and all of the Plaintiffs are diverse citizens. Defendants additionally noted that Plaintiffs claimed the leasing program raised over $40,000,000, that Plaintiffs claim they were defrauded, and that Plaintiffs seek compensatory, punitive and attorneys' fees exceeding $75,000.

II. DISCUSSION

Removal of an action properly filed in state court is not automatic. Removal from state to federal court is a statutory creature governed by 28 U.S.C. § 1441-1452. The removal statutes are strictly construed and all doubts are resolved in favor of remand and against removal. The party seeking to remove the case from state to federal court has the burden of establishing that the federal court has subject matter jurisdiction. Fajen v. Foundation Reserve Ins. Co., 683 F.2d 331, 333 (10th Cir. 1982) (internal citations omitted).

In this case, Defendants seek removal, arguing that the Court has subject matter jurisdiction under 28 U.S.C. § 1332(a). The parties agree that § 1332(a)'s first requirement is met. That is, the parties agree that this is a civil action "between citizens of different States." 28 U.S.C. § 1332(a)(1). Plaintiffs argue that § 1332(a)'s second requirement is not met in this case. Plaintiffs assert that "the matter in controversy [does not exceed] the sum or value of $75,000, exclusive of interest and costs." 28 U.S.C. § 1332(a). Defendant has the burden of establishing that the amount in controversy does exceed $75,000.00.

Ordinarily, the amount in controversy is to be determined by the allegations in the plaintiff's pleadings. Lonnquist v. J.C. Penny Co., 421 F.2d 597, 599 (10th Cir. 1970) (citing several cases). This standard is not easily applied when state rules of procedure restrict the ability of a litigant to specifically plead amounts in controversy. When the amount in controversy cannot be clearly discerned from the plaintiff's pleadings, the defendant bears the burden of establishing the amount in controversy.

Plaintiffs initially assert that Defendants' motion to remand is based on an unsubstantiated statement by Defendants that the claims exceed $75,000. Plaintiffs observe that, in an action involving multiple Plaintiffs, each Plaintiff's claim must satisfy the $75,000 jurisdictional amount. Plaintiffs additionally contend that the attorney's fee claims and the punitive damages claims in multiple plaintiffs cases cannot be aggregated to satisfy the jurisdictional amount requirement. Defendants do not dispute this contention.

Plaintiffs contend that at the time that they filed their state court petition, the Plaintiffs were aware that each Plaintiff would receive a portion of their original investment from the then-pending Alliance bankruptcy proceeding. Plaintiffs contend that Defendants knew this fact. Plaintiffs assert that on December 30, 1999 the Plaintiffs were informed that a plan proposed by the bankruptcy trustee was confirmed which proposed that each investor would receive approximately 40% of their original investment from the bankruptcy estate. Plaintiffs note that several of the individual Plaintiffs invested $10,000 in the Alliance Leasing Program and that no investor invested more than $50,000. Plaintiffs claim that each of the $10,000 investors[1/] will receive approximately forty percent of their original investment from the bankruptcy

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[1/] Plaintiffs assert that four investors invested $10,000 in the Alliance Leasing program. Plaintiffs additionally contend that, with the 40% reduction, six Plaintiffs will seek approximately $15,000 in actual damages, and no Plaintiff will seek more than $30,000 in actual damages. Defendants state that five Plaintiffs invested $10,000, two invested $10,500, one invested $13,000, four invested between $15,000 and $17,000, one invested $20,000, one invested 23,000, one invested $25,000, one invested $30,000, four invested between $31,000 and $35,000, one invested $36,000, one invested $45,000, and one invested $50,000. The investments total over $500,000.

estate and therefore their individual causes of action, in this lawsuit, are limited to approximately $6,000, plus attorneys fees and punitive damages.

Defendants suggest that the subsequent events occurring in the bankruptcy estate are, essentially, a "red herring." Defendants contend that the amount in controversy must exist at the time of removal, and subsequent events which decrease or modify the amount in controversy are irrelevant.

Defendants are correct. The amount in controversy is determined at the time of removal. A federal court that has jurisdiction at that time is not later divested of jurisdiction by post-removal reductions in the Plaintiff's claims. See, e.g., Bank IV Salina, N.A. v. Aetna Casualty and Surety Co., 783 F. Supp. 1315 (D. Kan. 1992).

Plaintiffs suggest that all of the parties knew, prior to removal, that the events in the bankruptcy court would decrease the amounts of Plaintiffs claims. Assuming this is true, the amount of the reduction, if any, of Plaintiffs claims was speculative at the time Defendants removed the action. In addition, as Defendants point out, Plaintiffs' petition demands the full amount of their investment. The Court concludes that the post-removal reduction of Plaintiffs' claims cannot be considered, and the amount of Plaintiffs claims at the time of the removal of the action will be determinative with regard to the jurisdictional amount.

Plaintiffs additionally contend that although they are entitled to punitive damages, Plaintiffs "will not seek punitive damages greater than four times the actual damages awarded by the jury." Plaintiffs Removal Brief at 5 [Doc. No. 12-1]. Again, however, nothing in Plaintiff's petition suggests that Plaintiffs are limiting their claim

for punitive damages.[2/] Plaintiffs have not entered into a stipulation of damages,[3/] and nothing in the pleadings or papers filed prior to removal suggests that punitive damages are limited. The Court concludes that Plaintiffs' post-removal self-limitation on punitive damages should not be considered by the Court in determining the jurisdictional amount for each Plaintiff. See also St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 292 (1938).

Plaintiffs additionally assert that the removing defendant is required to set forth in the notice of removal the underlying facts[4/] supporting the defendant's assertion that the amount in controversy exceeds the jurisdictional minimum. Plaintiffs contend that Defendants failed to do this. Plaintiffs note that some Plaintiffs have actual damages of $6,000, and that the addition of punitive damages and attorneys fees to this amount will not exceed the minimum jurisdictional amount of $75,000.

Plaintiffs acknowledge that a federal court in Tennessee concluded that the Court did have jurisdiction over parties in a similar action brought by investors in the

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[2/] Plaintiffs suggest that the Oklahoma statutes prohibit the inclusion of a dollar amount for punitive damages in the petition. Defendants suggest that inclusion of a ratio limitation on punitive damages would not violate the statute. The Court is not prepared to resolve the issue of whether or not Oklahoma law would prohibit the inclusion of such a ratio. Federal law requires that the Court not consider post-removal stipulations regardless of the pleading requirements of the state from which the petition was removed. Assuming Plaintiffs are correct and inclusion of a limiting ratio in their petition would violate federal law, Plaintiffs could have served, at the time of the service of their complaint, a stipulation setting forth the ratio or damages by which Plaintiffs were agreeing to be limited.

[3/] The Court is not suggesting that a post-removal stipulation of damages would be effective. Defendants point out, however, that even if Plaintiffs decline "to seek" in excess of four times the amount of punitive damages in state court, nothing prohibits the jury from awarding more than the damages "sought."

[4/] Defendants assert that one "underlying fact" is that the District Court in Tennessee concluded, under very similar facts, that removal was proper and denied the motion to remand. The Court does not view the District Court of Tennessee opinion as a "fact" supporting removal. Rather, the opinion is persuasive legal authority in support of Defendant's position.

Alliance Leasing program in Tennessee. Plaintiffs contend that the federal court did not follow Sixth Circuit law.[5/] The Tennessee decision, which is based on similar facts presently before this Court, is persuasive. However, the decision is merely a few sentences long and it does not detail the analysis by the Court in reaching the decision to deny the motion to remand. The submitted briefs from the Tennessee court indicate that one Plaintiff had a $5,000 claim and several other plaintiffs invested $10,000. Certainly, the facts before the Tennessee court appear similar to the facts presently before this Court.

Plaintiffs acknowledge that this is an attorneys fees case and both parties apparently agree that the Court should consider the award of attorneys fees in determining whether or not the jurisdictional amount has been met. Plaintiffs note that no definitive answer to the allocation of attorneys fees exists, but suggest that the Court consider the fact that the attorneys representing the Plaintiffs also are represent numerous other Plaintiffs in similar claims around the country. Plaintiffs contend that award of attorneys fees should, proportionally, not exceed the amount awarded for actual damages for each Plaintiff. Plaintiffs also cite several cases suggesting that attorneys fees should be allocated on a pro rata basis among Plaintiffs.

Defendants assert that this action is a complex securities case. Defendants state that

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[5/] Plaintiffs additionally assert that the Sixth Circuit Court of Appeals, in an unpublished case concluded that a claim of $4,000, plus punitive damages is insufficient to reach the jurisdictional amount in controversy. See Dulin v. Trans Union Information Co., 1991 WL 100584 (6th Cir. 1991). As noted by Defendants, the Sixth Circuit has rules similar to the Tenth Circuit Court of Appeals with regard to the citation of unpublished cases. Dulin also did not involve claims for attorneys fees, and the actual damages were $4,000. The Court cannot conclude, as argued by Plaintiffs, that the Tennessee federal court's refusal to remand the action was contrary to well established Sixth Circuit law.

one of their reasons for seeking multi-district consolidation[6/] was due to the complexity of the cases filed against them. Defendants note that in a complex securities action, any fee award would likely be large. Defendants additionally contend that limiting the amount of attorneys fees to the amount of actual damages recovered is unrealistic because it requires just as much effort to recover a smaller amount of actual damages as it does to recover a larger amount.

This action is a complex fraud and securities litigation case based on state law and involving 23 individual Plaintiffs. Attorneys fees for the Plaintiffs, in such an action could be $500,000. This Court is unaware of any authority that would require that attorneys fees be limited to the amount of actual damages that an individual recovered. A proportional division of $500,000 in attorneys fees between 23 Plaintiffs would result in a little more than $20,000 in attorneys fees per Plaintiff.

In determining the amount in controversy, Plaintiffs and Defendants appear to agree that the lowest dollar amount of actual damages for any Plaintiff is $10,000.[7/] Plaintiffs suggest an amount of attorneys fees of $10,000 pre Plaintiff. Defendants seem to suggest that attorneys fees should be at least $20,000. Adding attorneys fees to actual damages would result in a total of either $20,000 or $30,000. Therefore an award of punitive damages of five and one-half times to four and one-half

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[6/] Some of the cases which have remained in federal court have been consolidated in a multi-district litigation action. This action has been "conditionally transferred" pending the briefing and oral argument on a Motion to Vacate the conditional transfer order.

[7/] Plaintiffs additionally suggest that this should be reduced by approximately 40%. However, the Court declines to make this further reduction for the reasons discussed above.

times the "actual"[8/] damages results in an amount of damages for each Plaintiff sufficient to meet the jurisdictional amount. Given the Oklahoma punitive damages statute, the case law referenced by Defendants,[9/] and the facts of this case, the Court concludes that such an award is easily within the realm of punitive damages awards. The Court therefore concludes that the jurisdictional amount in controversy is satisfied, and this action should be retained by the District Court.

OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the

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[8/] Plaintiffs assert that in calculating punitive damages the "actual damages" of $5,700 (which includes the 40% reduction from the Bankruptcy Court) must be used. However, the amount of damages, for the purposes of determining removal is determined at the time of removal. The 40% reduction was not known at the time of removal. The lowest "actual damages" therefore, at the time of removal, for each Plaintiff was $10,000. Determining "estimate" punitive damages would then be based on the amount of actual damages at the time of removal, not the actual damages after learning of subsequent reductions.

[9/] Defendants reference several Oklahoma cases where the Oklahoma courts upheld punitive damages in excess of four and five times the actual damages award. See, e.g., Sides v. John Cordes, Inc., 1999 OK 36, 981 P.2d 301 (1999) (awarding up to ten times actual damages); Williamson v. Fowler Toyota, Inc., 1998 OK 14, 956 P.2d 858 (1998) ($15,000 award based on actual damages of $45).

party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 18 day of April 2000.

Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 18th Day of April, 2000.

E. Pattillo, Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA and THE INTERNAL REVENUE SERVICE,

Petitioner,

vs.

KIM K. CHAI,

Respondent.

Case No. 99-MC-21-K(J)

REPORT AND RECOMMENDATION

The Court has entered two Orders in this case requiring Respondent to comply with the IRS summons attached as Exhibit "B" to Petitioner's motion to enforce IRS summons. See Doc. Nos. 14 and 20, dated January 4, 2000 and March 3, 2000 respectively. Copies of these prior orders are attached to this Report and Recommendation for the Court's and the parties' convenience. Pursuant to these orders, Respondent was to produce documents in response to the IRS summons on or before February 7, 2000. To date, Respondent has not produced any documents in response to the IRS summons. Now before the Court is the Petitioner's motion to hold Respondent in contempt, which has been referred to the undersigned for a report and recommendation pursuant to 28 U.S.C. § 636. See Doc. No. 19. The undersigned held a show cause hearing on the motion for contempt on April 17, 2000, at which Evan Davis, a Department of Justice attorney for Petitioner, and Kim Chai, pro se, appeared.

Based on the briefs filed in this case and argument at the April 17th hearing, the undersigned finds as follows:

1. 26 U.S.C. § 7601 gives the IRS, as the delegate of the Secretary of the Treasury, the authority to "inquire after and concerning all persons . . . who may be liable to pay any internal revenue tax . . . ."

2. 26 U.S.C. § 7602 gives the IRS, as the delegate of the Secretary of the Treasury, the authority to issue the summons at issue in this case "[f]or the purpose of ascertaining or determining the correctness of any return, . . . determining the liability of any person for any internal revenue tax . . . or collecting any such liability."

3. The Court has previously determined that the summons issued in this case by the IRS is valid and enforceable, despite objections by Respondent as to due process, venue and this Court's jurisdiction. See Doc. Nos. 14 and 20. In particular, the Court has previously held that the IRS summons at issue was issued in good faith for a congressionally authorized purpose - to determine Respondent's income tax liability for 1995 and 1996; that the summons seeks information relevant to this congressionally authorized purpose; that the information requested by the summons is not already in the IRS' possession; and that the IRS has also complied with the service requirements for a summons set out in 26 U.S.C. § 7603. The summons has, therefore, been previously held to be enforceable by the IRS. United States v. Powell, 379 U.S. 48, 57-58 (1964); United States v. LaSalle National Bank, 437 U.S. 298, 313-14 (1978).

4. To date, Respondent has not complied with the IRS summons at issue.

5. This Court has the jurisdiction and power to enforce the IRS summons at issue pursuant to 26 U.S.C. § 7604, 26 U.S.C. § 7402 and 28 U.S.C. § 1340. Section 7604(b) specifically provides as follows:

> Whenever a person summoned under section . . . 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court . . . for an attachment against him as for a contempt. It shall be the duty of the judge . . . to hear the

> application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge . . . shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

6. The Court held a show cause hearing pursuant to § 7604(b) on April 17, 2000 at which Mr. Chai was given an opportunity to present any justifiable reasons he had for his failure to comply with this Court's prior orders enforcing the IRS summons. At the hearing, Mr. Chai presented no justifiable reason for his failure to comply with this Court's prior orders. The undersigned finds, therefore, that Mr. Chai is in contempt of the Court's January 4, 2000 and March 3, 2000 Orders.

7. The undersigned recommends that Mr. Chai be permitted to purge himself of his contempt by complying with the IRS summons by producing all responsive documents in his possession to Revenue Agent Donna Meadors at her office on May 2, 2000 at 10:00 a.m. To the extent that Mr. Chai does not have any records for a certain category of documents listed on the summons, he shall so state in writing and provide a copy of his written statement to Agent Meadors. To the extent Mr. Chai no longer has copies of requested bank statements, his written statement to Agent Meadors shall include the name of the financial institution(s) where the account(s) were when the statements did exist, along with the account number and the name(s) on each account.

8. If Mr. Chai fails to purge his contempt by producing to Agent Meadors all responsive documents on May 2, 2000, the undersigned recommends that the Court issue a warrant for Mr. Chai's arrest and that he be incarcerated until he is willing to comply with the IRS' lawful summons.

OBJECTIONS

The District Judge assigned to this case will conduct a de novo review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 18 day of April 2000.

Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 18th Day of April, 2000.

Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA and THE INTERNAL REVENUE SERVICE,

Petitioner,

vs.

KIM K. CHAI,

Respondent.

Case No. 99-MC-21-K(J)

ORDER

Now before the Court is Petitioner's "Petition to Enforce Internal Revenue Service Summons." [Doc. No. 1]. The Court previously issued an Order to Respondent, requiring Respondent to show cause why he should not have to produce documents in response to an Internal Revenue Service ("IRS") summons. [Doc. No. 2]. Respondent appeared at a show cause hearing on September 14, 1999 before Magistrate Sam A. Joyner. At the hearing, Magistrate Joyner gave Respondent leave to file any briefs he wished to file in an attempt to establish why he should not be required to respond to the IRS' summons. Respondent filed "Pretrial Motions" and "Pretrial Objections" on October 19, 1999 [Doc. Nos. 3 and 4]. Respondent also filed a "Motion to Dismiss for Lack of Venue and Jurisdiction" on November 9, 1999. [Doc. No. 6]. The Court has reviewed Respondent's motions and objections and it finds Petitioner's responses to those motions and objections persuasive. See Doc. Nos. 9 and 10. Respondent's objections and motions are without merit.

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The Court finds that the IRS summons at issue was issued in good faith for a congressionally authorized purpose – to determine Respondent's income tax liability for 1995 and 1996. With one exception to be discussed below, the Court finds that the summons seeks information relevant to this congressionally authorized purpose. The information requested by the summons is not already in the IRS' possession. The IRS has also complied with the service requirements for a summons set out in 26 U.S.C. § 7603. The summons is, therefore, enforceable by the IRS. United States v. Powell, 379 U.S. 48, 57-58 (1964); United States v. LaSalle National Bank, 437 U.S. 298, 313-14 (1978).

This Court agrees with the Fifth Circuit's holding in Crain v. Commissioner of Internal Revenue, 737 F.2d 1417 (5th Cir. 1984) that the constitutionality of the nation's income tax system, including the role played within that system by the IRS, has long been established. Id. at 1417-18. Consequently, the Court, as did the Fifth Circuit, sees no reason to refute each of Respondent's arguments in detail. To do so might suggest that these arguments have some colorable merit, which they do not.

By February 7, 2000, Respondent shall produce to Internal Revenue Agent Donna Meadors those documents listed on the exhibit attached to the subpoena, with the exception of the requested patient files. See Doc. No. 1, Exhibit "B." The third paragraph of the exhibit to the subpoena seeks the patient "files for all patients treated [by Respondent] during 1995 and 1996." Id. The Court finds that before the IRS will be entitled to Respondent's patient files, the IRS will have to make a more particularized showing of need for Respondent's patient files. The IRS will also have

to satisfy the Court that the privacy interests of Respondent's patients will not be impinged by the production of Respondent's patient files. Consequently, Respondent will not be required to produce his patient files until the IRS obtains an additional order from this Court authorizing the production of Respondent's patient files.

The Court Clerk shall show docket numbers 1, 4 and 6 as satisfied by this Order.

IT IS SO ORDERED.

Dated this 4th day of January 2000.

Terry C. Kern
United States District Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA and THE INTERNAL REVENUE SERVICE,

Petitioner,

vs.

KIM K. CHAI,

Respondent.

Case No. 99-MC-21-K(J)

ORDER

The Court entered an Order in this case on January 4, 2000 requiring Respondent to comply with the IRS summons at issue. Respondent was to comply with the summons by February 7, 2000. On February 7, 2000, Respondent filed with the Court a Notice of Jurisdictional Defects and a Judicial/Administrative Notice. [Doc. Nos. 15 and 16]. To the extent Respondent intended these documents to serve as either a motion to reconsider or a motion to alter or amend the Court's prior judgment, they are **DENIED**.

Respondent is directed to comply with the Court's January 4th Order.

IT IS SO ORDERED this 3rd day of March 2000.

Terry C. Kern
United States District Judge

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 00CV0095B (J)
	)	
KIMBERLY D. WILSON, A/K/A KIMBERLY DAWN WILSON,	)	
	)	
Defendant.	)	

DEFAULT JUDGMENT

This matter comes on for consideration this 18th day of April, 2000, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Kimberly D. Wilson, a/k/a Kimberly Dawn Wilson, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Kimberly D. Wilson, a/k/a Kimberly Dawn Wilson, filed herein her Waiver of Service of Summons on February 17, 2000. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Kimberly D. Wilson, a/k/a Kimberly Dawn Wilson, for the principal amount of $4,728.10, plus accrued interest of $370.51, plus interest thereafter at the rate of 10 percent per annum until judgment, plus filing fees in the amount of $150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 6.197% percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

PHIL PINNELL, OBA # 7169
Assistant United States Attorney
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(918)581-7463

PEP/dlo

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL R. SANDBORN,

Plaintiff,

vs.

ORKIN EXTERMINATING, INC.,

Defendant.

Case No. 99 CV 0361B(M)

ORDER OF DISMISSAL

The Plaintiff's Stipulation for Dismissal With Prejudice comes on for consideration before the undersigned Judge. On considering the Stipulation for Dismissal With Prejudice, the Court determines that this proceeding should be dismissed wiith prejudice, each party bearing their own costs.

IT IS SO ORDERED this 18th day of April, 2000.

THE HONORABLE THOMAS BRETT
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

PHILLIP HORACEK and ELIZABETH HORACEK,

Plaintiffs,

v.

RESOLUTION GGF OY, a foreign corporation,

Defendant.

Case No. 00CV0067-E

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) the parties hereby stipulate to the dismissal of the referenced case with prejudice to future filing. A proposed order approving this Stipulation of Dismissal is presented contemporaneously herewith.

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ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PENNWELL PUBLISHING COMPANY, ESTATE OF HELEN B. LAUINGER, DECEASED, ROBERT F. BIOLCHINI, EXECUTOR, TAX MATTERS PERSON,

Plaintiff,

v.

UNITED STATES OF AMERICA AND COMMISSIONER OF INTERNAL REVENUE,

Defendant.

Case No. 97-CV-1139 K

STIPULATION FOR DISMISSAL

It is hereby stipulated and agreed that the complaint in the above-entitled case be dismissed with prejudice, the parties to bear their respective costs, including any possible attorneys' fees or other expenses of this litigation.

STUART, BIOLCHINI, TURNER & GIVRAY

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IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

GABRIEL ARNEZ ALEXANDER,

Plaintiff,

vs.

METRIS DIRECT, INC.,

Defendant.

No. 99 CV 0598H (M)

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to FED.R.CIV.P. 41, the parties, and each of them, by and through their respective counsel of record, herewith stipulate and agree to the dismissal with prejudice of said cause, including all complaints, counterclaims, cross complaints and causes of action of any type by any party against any or all of the other parties. Each party shall bear his or its own costs, expenses, and attorney fees without assessment against any other party.

Executed the respective dates shown adjacent to each signature.

Date: 4-17-2000

Patterson Bond, Attorney for Plaintiff

Date: 4-17-2000

Jo Anne Deaton, Attorney for Defendant

JAD/bjo
1510-1

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

HORSEHEAD INDUSTRIES, INC., d/b/a ZINC CORPORATION OF AMERICA,	)	
Plaintiff,	)	
v.	)	**Case No. 00-CV-0044-K (E)**
TETRA TECH, INC.,	)	
Defendant.	)	

REPORT AND RECOMMENDATION

The Court referred to the undersigned for report and recommendation the motion to remand and brief in support (Dkt. #4) filed by plaintiff, Horsehead Industries, Inc., d/b/a Zinc Corporation of America ("ZCA").[1] For the reasons stated herein, the undersigned recommends that the motion to remand be **GRANTED** and the case remanded to state court. The undersigned further recommends that requests of defendant, Tetra Tech, Inc. ("TTI") for discovery and evidentiary hearing (Dkt. #10) be **DENIED**. Finally, the undersigned recommends that ZCA's requests for costs and attorney fees (Dkt. #4) be **GRANTED**.

FACTS

1. ZCA filed an amended petition in Washington County (Oklahoma) District Court on December 21, 1999, seeking damages for breach of contract and negligence as well as for declaratory and injunctive relief. (Dkt. #4, Ex. A) The case arises out of a contract for construction management

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[1] The undersigned will refer to the corporate plaintiff as "ZCA" because that abbreviation is used in the contract between the parties, as well as the pleadings filed by that corporate entity. The fact that an abbreviation of a corporate trade name (d/b/a) is used as an identifier in no way diminishes the fact that the legal entity which is the plaintiff is a corporation incorporated in Delaware.

services in connection with the environmental remediation of ZCA's facility in Bartlesville, Oklahoma. (Dkt. #10, attachment) The parties to the contract are ZCA and TTI.

2. TTI filed a notice of removal (Dkt. #4, Ex. B), alleging jurisdiction in this Court based on diversity of citizenship. In the same notice, TTI recited that ZCA and TTI are Delaware corporations. (Id. ¶ 2)

3. Plaintiff ZCA is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York. (Amended Petition ¶ 1; Answer and Counterclaim ¶ 1; see Notice of Removal ¶ 2)

4. Defendant TTI is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in California. (Amended Petition ¶ 2; Answer and Counterclaim ¶ 2; see Notice of Removal ¶ 2)

5. The contract between the parties recites that ZCA and TTI are Delaware corporations. (Dkt. #10, attachment)

DISCUSSION

No Complete Diversity

Civil actions brought in state court may be removed to federal court by a defendant so long as the federal court has original jurisdiction over the action. 28 U.S.C. § 1441(a). Once a case is removed, the court must remand the case to state court if the court lacks subject matter jurisdiction. Id. § 1447(c).

TTI removed this action on the basis of diversity of citizenship. (Notice of Removal, ¶ 2) ZCA has moved to remand on the ground that there is no complete diversity of citizenship because ZCA and TTI are both citizens of Delaware. ZCA is correct.

A corporation has dual citizenship for diversity purposes -- the state of incorporation and the state where its principal place of business is located. 28 U.S.C. § 1332(c)(1). ZCA is a citizen of Delaware and New York; TTI is a citizen of Delaware and California. TTI has admitted these jurisdictional facts in its answer and counterclaim (Dkt. #3).

In an effort to circumvent this clear lack of diversity, TTI argues that ZCA is an unincorporated division of Horsehead Industries, Inc., and thus (as unincorporated) is not a citizen of Delaware. This argument is meritless. A division of a corporation has the same citizenship as the corporation. Equifax Servs., Inc. v. Hitz, 905 F.2d 1355, 1358 n. 2 (10th Cir. 1990).

Second, TTI argues that its second-tier subsidiary, KCM Construction Management & Inspection, Inc. ("CMI"), rather than itself, is the real party in interest as defendant, and its citizenship should be considered for diversity scrutiny. This argument is also meritless. The answer and counterclaim was filed by TTI. (Dkt. #3) The contract at issue is between ZCA and TTI. CMI is not a named party to the contract, and is not expressly mentioned in the contract. Further, as ZCA points out, the contract expressly prohibits delegation of TTI's obligations to another party without written approval from ZCA. (Dkt. #10, attachment, ¶ 3.4)

The undersigned proposes findings that TTI is the real party in interest as defendant, and that there is no complete diversity between ZCA and TTI because both corporations are citizens of Delaware. The undersigned recommends that ZCA's motion to remand (Dkt. #4) be granted, and that this case be remanded to state court.

Discovery/Hearing Unwarranted

TTI asks the Court for limited discovery on the jurisdictional issue "for the purpose of learning more about the relationship between Zinc Corporation of America and Horsehead

Industries," and for an evidentiary hearing so the Court can "ascertain the real controversy." (Dkt. #10, at 6) The contract between the parties recites, and TTI has admitted in its objection to the motion to remand, that Zinc Corporation of America is an unincorporated division of Horsehead Industries, Inc. (Dkt. #10, at 4-5) There are no additional facts to be learned about this relationship which would be of assistance on this issue. The undersigned recommends that the requests for discovery and evidentiary hearing (Dkt. #10) be denied.

Request for Costs/Attorneys Fees

In its motion to remand, ZCA seeks its costs and expenses, including attorney fees, incurred as a result of the removal. The relevant statute provides:

> If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.

28 U.S.C. § 1447(c). While the undersigned does not recommend costs and fees lightly, in the instant case the lack of subject matter jurisdiction was apparent from the contract, TTI's admissions in the answer and counterclaim, and TTI's notice of removal. TTI's arguments to avoid the lack of diversity were transparent at best. For these reasons, the undersigned recommends that ZCA be awarded its costs and actual expenses, including attorney fees, incurred as a result of the removal If this part of the Report and Recommendation is adopted, ZCA should file the necessary papers within fourteen (14) days of the entry of judgment. See N.D. LR 54.1, 54.2.

CONCLUSION

Based upon the foregoing, the undersigned recommends that the motion to remand (Dkt. #4) be **GRANTED** and the case remanded to state court. The undersigned further recommends that

TTI's request for discovery and evidentiary materials (Dkt. #10) be **DENIED**. Finally, the undersigned recommends that ZCA's request for costs and attorney fees (Dkt. #4) be **GRANTED**.

OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must file them with the Clerk of the District Court within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1); see also Fed. R. Civ. P. 72(b). **The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court.** See Thomas v. Arn, 474 U.S. 140 (1985); Haney v. Addison, 175 F.3d 1217 (10th Cir. 1999).

DATED this 17th day of April, 2000.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF MAILING

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 18 Day of April, 2000.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BE BILINGUAL, INC.,

Plaintiff,

vs.

PHILLIPS PETROLEUM COMPANY, and CLAUDIA MACOUZET,

Defendants.

Case No. 99-CV-206-Bu(J)

SUPPLEMENT TO REPORT AND RECOMMENDATION

The undersigned issued a Report and Recommendation in the above referenced case on March 17, 2000. [Doc. No. 75]. The undersigned offers the following as a supplement to the March 17th Report and Recommendation.

As explained in the March 17th Report and Recommendation, during the course of considering Defendants' motions for summary judgment, the undersigned requested that Defendant Phillips submit clean copies of certain deposition transcripts. As stated in the Report and Recommendation, the undersigned made this request "[b]ecause the record in this case is large, and particularly because the relevant deposition transcripts submitted by the parties were scattered across many attachments, exhibits and appendices . . . ." Doc. No. 75, p. 11.

Plaintiff filed an objection to the March 17th Report and Recommendation. [Doc. No. 79]. On pages 19-20 of its objection, Plaintiff raises several questions

regarding the undersigned's request to Defendant Phillips for deposition transcripts in this case. The undersigned files this supplemental Report and Recommendation to respond to these questions.

Question #1: "Why was Defendant Phillips asked, ex parte, to submit clean copies?"

Response: Phillips, and not Plaintiff, was asked to provide the transcripts because the undersigned was considering Phillips' motion for summary judgment. If the expense of making additional transcripts was to be incurred, the undersigned determined that the expense should fall on the party filing the motion.

Question #2: "Did the Court determine 'relevance,' or did Phillips determine 'relevance' and from that basis submit depositions?"

Response: The undersigned's clerk made one phone call to counsel for Defendant Phillips and requested that Defendant Phillips make available clean copies of the deposition transcripts for the following witnesses: Ann Elizabeth Thrush, Norma Medina, Annette Thrush Moss, Patricia Romines, Jamie Wilson and Pedro Carranza. The undersigned told Defendant's counsel which deposition transcripts the Court wanted copies of. Phillips' counsel did not select which deposition transcripts the Court would review. There was no communication other than a request by the undersigned's clerk to submit clean copies of the deposition transcripts for the six witnesses identified above.

Question #3: "Were there any accompanying communications from Phillips along with the submission of the depositions?"

Response: No.

Question #4: "Why was Phillips asked to submit evidence to clarify Be Bilingual's arguments?"

Response: See response to Question # 1. The transcripts were originally requested because the record as presented to the Court was difficult to use. The deposition excerpts relied on by the parties were scattered across several different filings. Copies of the transcripts themselves enabled the Court to more easily locate and read the testimony cited by the parties in their briefs.

As stated in the March 17th Report and Recommendation, the undersigned found that deposition testimony Plaintiff identified in its summary judgment brief was not sufficient to withstand summary judgment on the first element of its trade secret claim. To ensure that Plaintiff was given the full benefit of all inferences which could be drawn from the evidence, as is required when ruling on a motion for summary judgment, and to understand the nature of Plaintiff's trade secret argument, which was poorly articulated in the briefing, the undersigned reviewed the entire deposition transcripts of Ann Elizabeth Thrush, Norma Medina and Annette Thrush Moss, which had previously been made available at the undersigned's request. After this review, the undersigned actually ruled in favor of Plaintiff, finding that a question of fact existed as to the first element of Plaintiff's trade secret claim.

Question #5: "Why wasn't an evidentiary hearing set for both sides to attend to determine the extent to which the Court would be provided additional evidence?"

Response: "Evidentiary" hearings are not held in connection with motions for summary judgment. The undersigned determined no hearing on the motions for summary judgment was necessary.

Question #6: "Did Phillips submit evidence in addition to what the Court says it actually read?"

Response: No.

OBJECTIONS

The District Judge assigned to this case will conduct a de novo review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 17 day of April 2000.

Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 18 Day of Apr. 2000, [illegible].

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN WINTON and EVELYN WINTON,

Plaintiffs,

v.

BOARD OF COUNTY COMMISSIONERS OF TULSA COUNTY, OKLAHOMA; STANLEY GLANZ, individually and in his official capacity as Tulsa County Sheriff; JACK PUTMAN; and WEXFORD HEALTH SOURCES INC., a Florida Corporation,

Defendants.

Case No. 97-CV-841-J

AMENDED JUDGMENT BY AGREEMENT

This action comes on for hearing on this 17th day of April, 2000, the Plaintiffs, John Winton and Evelyn Winton (the "Wintons"), appearing by and through their legal counsel, D. Gregory Bledsoe and Steven Novick, and Defendants, Board of County Commissioners of Tulsa County, Oklahoma ("the Board") and Stanley Glanz, Tulsa County Sheriff ("Sheriff Glanz"), appearing by and through their legal counsel, C.S. Lewis, III and Reuben Davis, respectively.

The Court finds that on March 20, 2000, the Board, by motion during a regularly scheduled meeting, unanimously agreed to enter into a settlement agreement with the Wintons, without admitting any liability as to the Board, Tulsa County, Sheriff Glanz and all of their respective employees in both their individual and official capacities, for the total sum of $75,000 (seventy-five thousand dollars) which is inclusive of all damages, costs, litigation expenses, prejudgment interest and attorneys' fees.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiffs, John Winton and Evelyn Winton, jointly have and recover judgment by agreement of and from Defendants, the Board and Stanley Glanz in his official capacity as Tulsa County Sheriff, as full and final

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settlement of all claims for the total sum of $75,000, inclusive of all damages, costs, litigation expenses, prejudgment interest and attorneys' fees, together with interest from the date of this Amended Judgment at the rate of 6.197 % per annum.

Sam A. Joyner
U.S. MAGISTRATE JUDGE

APPROVED AS TO FORM:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARTIN YANDELL,

Petitioner,

vs.

BOBBY BOONE, Warden; and THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,

Respondents.

No. 00-CV-020 BU (M)

ORDER

This is a habeas corpus action filed pursuant to 28 U.S.C. § 2254. Petitioner is a state inmate, represented by counsel. Before the Court are Respondent's motion to dismiss petition for writ of habeas corpus as time barred by the statute of limitations and alternatively, for failure to exhaust state court remedies (Docket #4), filed March 2, 2000, and Petitioner's voluntary motion to dismiss without prejudice (Docket #8) filed April 7, 2000. In his motion, Petitioner indicates he intends to return to state court to exhaust all of his state remedies.

Pursuant to Fed. R. Civ. P. 41(a), Petitioner does not need leave of Court to dismiss this action voluntarily at this point in the proceedings. Therefore, the Court finds Petitioner's motion to dismiss without prejudice should be granted. However, Petitioner is advised that this dismissal without prejudice will not preclude the assertion of a statute of limitations defense by the respondent in any future federal habeas corpus action challenging the conviction(s) at issue in this case.

Respondent's motion to dismiss petition for writ of habeas corpus as time barred by the statute of limitations and alternatively, for failure to exhaust state court remedies has been rendered moot by today's ruling.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Petitioner's motion to dismiss without prejudice (Docket #8) is **granted**.

2. The petition for writ of habeas corpus (Docket #1) is **dismissed without prejudice**.

3. Respondent's motion to dismiss petition for writ of habeas corpus as time barred by the statute of limitations and alternatively, for failure to exhaust state court remedies (Docket #4) is **moot**.

SO ORDERED THIS 17th day of April, 2000.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

P.K. EBERT, Ph.D.,

Plaintiff,

vs.

THE STATE OF OKLAHOMA, ex rel., THE BOARD OF REGENTS OF OKLAHOMA COLLEGES, a state agency,

Defendant.

Case No. 99-CV-94-BU(M)

ORDER

On October 8, 1999, following a jury trial, the jury rendered a verdict that Plaintiff's sex was a motivating factor in the employment decision of Defendant and that Defendant would have made the same employment decision regarding Plaintiff in the absence of the discriminatory motive. On November 1, 1999, this Court entered a judgment consistent with the jury's verdict. Thereafter, upon application of Plaintiff, the Clerk of the Court entered an award of costs in favor of Plaintiff in the amount of $2,113.35.

Presently before the Court is Defendant's Motion to Review Taxation of Costs and Plaintiff's Motion to Tax Attorney Fees as Costs. The Court has carefully reviewed the parties' submissions and concludes that Defendant's motion should be denied and that Plaintiff's motion should be granted.

Section 2000e-5(g)(2)(B)(i) of Title 42 of the United States Code provides in pertinent part:

(B) On a claim in which an individual proves a violation

> under [42 U.S.C. § 2000e-2(m)] of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court--
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to pursuit of a claim under § 2000-2(m) of this title....

As set out, Section 2000e-5(g)(2)(B)(i) provides that the court may grant costs in the described circumstances. In this case, the jury found that Plaintiff had proven that her sex was a motivating factor in Defendant's employment decision. The jury, however, also found that Defendant had demonstrated that it would have taken the same action in the absence of Plaintiff's sex. The Court concludes that there was sufficient evidence in the record to support such findings.[1] Because § 2000e-5(g)(2)(B)(i) authorizes the Court to award costs based upon the jury's findings and verdict in this case, the Court finds that Plaintiff should be awarded costs directly attributable to the pursuit of her § 2000e-2(m) claim.[2]

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[1] Defendant claims that § 2000e-5(g)(2)(B)(i) has no application because Plaintiff failed to present evidence of any impermissible considerations of her sex in Defendant's employment decision within the statute of limitations. Defendant contends that the jury's finding that Plaintiff's sex was a motivating factor in Defendant's employment decision was therefore erroneous. The Court, however, rejects Defendant's argument. The Court concludes that the record contained sufficient evidence to support the jury's finding.

[2] In its brief, Defendant objects to an award of costs in favor of Plaintiff on the basis that Plaintiff is not a "prevailing party." The Court, however, rejects Defendant's argument. Section 2000e-5(g)(2)(B)(i) does not use or refer to the term "prevailing party." Under the plain language of § 2000e-5(g)(2)(B)(i), Plaintiff is eligible for costs if she satisfies the circumstances identified therein. As herein stated, Plaintiff has satisfied those circumstances and therefore is entitled to an award of costs.

As Defendant has only objected to Plaintiff's entitlement to costs and not to the nature and/or amount of costs taxed by the Court Clerk, the Court finds that the Court Clerk's award of $2,113.35 for costs is appropriate.

Section 2000e-5(g)(2)(B)(i) also authorizes the award of attorney's fees. The Court finds that Plaintiff should be awarded attorney's fees under this section in light of the jury's findings and verdict in this case. The Court concludes that its finding is in accordance with the Tenth Circuit's decision in Gudenkauf v. Stauffer Communications, Inc., 158 F.3d 1047 (10th Cir. 1998).

In its brief, Defendant alternatively argues that the Court should deny Plaintiff an award of attorney's fees under § 2000e-5(g)(2)(B)(i) because of "special circumstances." In Gudenkauf, the Tenth Circuit stated that "a plaintiff who prevails under § 2000e-2(m) should ordinarily "`"be awarded attorney's fees in all but special circumstances."'" Gudenkauf, 158 F.3d at 1081 (citations omitted). Defendant contends that special circumstances exist in this case which render an award of attorney's fees unjust. Specifically, Defendant contends that the jury's finding that Plaintiff's sex was a motivating factor in Defendant's employment decision was erroneous. Defendant asserts that all of the events, which could have provided a basis for inferring impermissible considerations of Plaintiff's sex in Defendant's employment decision, occurred outside the statute of limitations. Defendant maintains that with no evidence of sexual discrimination occurring within the statutory period, the jury could not find in favor of

Plaintiff on her claim. Because no evidence existed to support Plaintiff's claim, Defendant contends that the jury's verdict cannot be used by the Court to award attorney's fees under § 2000e-5(g)(2)(B)(i).

The Court notes that Defendant did not file any post-judgment motions challenging the jury's verdict nor did it file any appeal from that verdict. Therefore, the Court's judgment consistent with the jury's verdict finding, in part, that Plaintiff's sex was a motivating factor in Defendant's employment decision is final.[3] Nonetheless and despite Defendant's argument to the contrary, the Court, as previously stated, finds that sufficient evidence existed to support the jury's verdict. Consequently, the Court rejects Defendant's argument that Plaintiff should be denied an award of attorney's fees under § 2000e-5(g)(2)(B)(i) because Plaintiff allegedly failed to establish actionable discrimination.

In its brief, Defendant also contends that no attorney's fees should be awarded because Plaintiff received a technical or de minimis victory. This contention, however, was rejected in Gudenkauf. The Tenth Circuit specifically held in Gudenkauf that the nature of the plaintiff's victory in a mixed motive case is not a special circumstance that would make an award of attorney's fees

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[3] The Court notes that the unresolved issue of attorney's and costs does not prevent judgment on merits from becoming final. See, Budinich v. Becton Dickinson Co., 486 U.S. 196, 202 (1988); see also, Utah Women's Clinic, Inc. v. Leavitt, 75 F.3d 564, 566-67 (10th Cir. 1995)(attorney's fees and costs are collateral to and separate from merits of judgment).

unjust. Gudenkauf, 158 F.3d at 1082.[4]

In regard to the specific amount of attorney's fees requested, Defendant objects to Plaintiff receiving an award of attorney's fees over and above $15,000.00. Defendant contends that Plaintiff's award of attorney's fees should be limited to $15,000.00 because such amount represents Plaintiff's maximum liability for attorney's fees under the employment contract with her counsel, Stan Ward. However, Defendant further contends that in light of her de minimus victory, Plaintiff's award of attorney's fees should be reduced by fifty percent (50%). Thus, Defendant contends that Plaintiff should only be awarded attorney's fees, if at all, in the amount of $7,500.00.

In addition, Defendant, in its supplemental brief, objects to Plaintiff's request for compensation for Mr. Ward's travel time from Norman to Tahlequah for the depositions of Al Williams, Larry Williams and Earl Williams on April 14 and April 15, 1999. Defendant contends that Plaintiff should not be awarded travel time for each day Mr. Ward attended the depositions. Defendant contends that Mr. Ward should have stayed in a hotel rather than traveling the seven hours to Tahlequah each day. Defendant also states that Mr. Ward's fee should be reduced for the traveling time. Defendant also objects to Plaintiff's request for compensation for Mr. Ward and Mr. Glass' travel time to Tulsa and from Norman for each day of

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[4] In Gudenkauf, the Tenth Circuit also stated that "recovery of damages is not a proper factor upon which to assess the propriety of granting a fee award in a mixed motive case." Gudenkauf, 158 F.3d at 1081.

trial.

According to the Tenth Circuit, the "`" most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonably hourly rate."'" Ellis v. University of Kansas Medical Center, 163 F.3d 1186, 1202 (10th Cir. 1998)(quoting Beard v. Teska, 31 F.3d 942, 955 (10th Cir. 1994), Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)).

A reasonable rate is the prevailing market rate in the relevant community. Malloy v. Monahan, 73 F.3d 1012, 1018 (10th Cir. 1996)(citing Blum v. Stenson, 465 U.S. 886, 895 (1984)). "The relevant market value is not necessarily the price which a party's lawyer charged to prosecute the case, but, rather, the market value is `the price that is customarily paid in the community for services like those involved in the case at hand.' Ellis v. University of Kansas Medical Center, 163 F.3d 1186, 1203 (10th Cir. 1998)(quoting Beard v. Teska, 31 F.3d 942, 956 (10th Cir. 1994)). Thus, the requested rates must be in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. Malloy, 73 F.3d at 1018.

In the instant case, the parties, during telephone conferences with this Court, have stipulated that the prevailing market rate in Tulsa, Oklahoma for the services provided by Mr. Ward is $200.00 per hour. They have also stipulated that the prevailing market rate for Mr. Glass is $90.00 per hour. Upon due consideration,

the Court agrees with the parties that the hourly rate of $200.00 for Mr. Ward is reasonable and the market rate for the work he performed in this case. The Court also finds that $90.00 is a reasonable hourly rate for Mr. Glass based upon his experience and qualifications.

As to the reasonable number of hours expended, the Court concludes that Plaintiff should be compensated for Mr. Ward's time traveling to and from Tahlequah for the Williams' depositions. Mr. Ward has represented to the Court that he made only one trip to Tahlequah from Norman and that Plaintiff has only requested to be compensated for the one trip. As represented by Mr. Ward, the remainder of the time was spent preparing for and attending the depositions. The Court also concludes that Plaintiff should be compensated for Mr. Ward and Mr. Glass' travel from Norman to Tulsa for each day for trial. The Court finds that Plaintiff is entitled to recover for that time. Mr. Ward has represented to the Court that counsel prepared for the next day of trial while traveling. The Court finds that counsel would have spent the same time in preparing for trial had they stayed in a hotel in Tulsa.

The Court must next determine whether the loadstar figure should be limited to $15,000.00 as urged by Defendant. Upon review, the Court concludes that the loadstar figure should not be limited to $15,000.00 to reflect Plaintiff's liability under the employment contract with Mr. Ward. The Court notes that Mr. Ward's fees under the employment contract were not limited solely to $15,000.00. According to the employment contract, Mr. Ward was

entitled to recover a contingency fee of 50% of any recovery by way of a judgment after Plaintiff's trial began. In addition, Defendant has not cited any authority to limit or cap Plaintiff's award based solely upon her employment contract. Furthermore, the Court notes that the Supreme Court has ruled that the amount actually paid or owed by a client under a contingency fee agreement does not necessarily limit a district court in determining a reasonable fee. Blanchard v. Bergeron, 489 U.S. 87, 93 (1989).

In light of the foregoing discussion, the Court calculates the lodestar figure, i.e. reasonable hours (210.50 for Mr. Ward and 92 for Mr. Glass) multiplied by reasonable hourly rates ($200.00 per hour for Mr. Ward and $90.00 per hour for Mr. Glass), see, Hensley v. Eckerhart, 461 U.S. 424, 434 (1983), to be $50,380.00.

The Court must now determine whether the lodestar figure should be reduced by fifty percent (50%) based on an assessment of the degree of the overall success on Plaintiff's claim. In the instant case, Plaintiff did not recover on her claims for back pay and compensatory damages. However, the Court opines from the evidence presented at trial that Plaintiff brought this suit not only to recover back pay and compensatory damages but to validate her belief that she was a victim of gender discrimination. In this respect, the mixed motive jury verdict was a success for Plaintiff. Despite Defendant's arguments to the contrary, the Court cannot say that this case was more about Plaintiff's conduct than it was the discriminatory conduct of Defendant. In addition, the Court cannot say the success Plaintiff had in proving that her sex was a

motivating factor in Defendant's employment decision was slight. Balancing the public policy furthered by §§ 2000e-2(m) and 2000e-(g)(2)(B)(i) and the degree of success that Plaintiff achieved, the Court, similar to the district court in Gudenkauf, concludes that a reduction of the lodestar figure by fifty percent (50%) is appropriate.

In sum, the Court finds that Plaintiff should recover her costs in the amount of $2,113.35. The Court also finds that Plaintiff should be awarded reasonable attorney's fees in the amount of $25,190.00.

Based upon the foregoing, the Court **DENIES** Defendant's Motion to Review Taxation of Costs (Docket Entry #51) and **GRANTS** Plaintiff's Motion for Taxation of Attorney's Fees as Costs (Docket Entry #46). Plaintiff is awarded costs in the amount of $2,113.35 and reasonable attorney's fees in the amount of $25,190.00.

ENTERED THIS 17th day of April, 2000.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 17 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TONYA GRAY,

Plaintiff,

vs.

JOYE LARY CROW, CLIFF VICKERS and MIKE SMITH, individually and as representatives and agents of BROWNING TRANSPORTATION, INC.,

Defendant.

Case No. 99-CV-938-BU

ENTERED ON DOCKET
APR 17 2000
DATE

ORDER

On March 23, 2000, this Court entered an Order directing Plaintiff, Tonya Gray, to appear by other counsel or in propria persona by April 7, 2000. The Court advised Plaintiff that failure to appear by other counsel or in propria persona may result in dismissal of this action without prejudice.

The Court has reviewed the record in this case. It appears that Plaintiff has not appeared by other counsel or in propria persona as directed. The Court therefore finds that this action should be dismissed without prejudice.

Accordingly, Plaintiff's action against Defendants is **DISMISSED WITHOUT PREJUDICE**. Plaintiff's Motion to Impose Fees and Costs upon Defendant, Browning Transportation, Inc., Pursuant to F.R.C.P. 4(d)(2) (Docket Entries #9-1; #9-2) is also **DENIED**.

ENTERED this 17th day of April, 2000.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 00CV0070BU(E)
	)	
CHARLES RICKNER,	)	
	)	
Defendant.	)	

DEFAULT JUDGMENT

This matter comes on for consideration this 17th day of April, 2000, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Charles Rickner, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Charles Rickner, was served with Summons and Complaint on March 15, 2000. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Charles Rickner, for the principal amount of $2,848.66, plus accrued

interest of $1,244.81, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of $150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 6.197 percent per annum until paid, plus costs of this action.

Michael Burrage
United States District Judge

Submitted By:

Phil Pinnell

PHIL PINNELL, OBA # 7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918)581-7463

PEP/llf

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAXI CRISP CANADA INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 00-CV-0068 H(M)
	)	
SILVERADO FOODS INC.,	)	
	)	
Defendant.	)	

JOURNAL ENTRY OF DEFAULT JUDGMENT

Plaintiff Maxi Crisp Canada Inc.'s "Motion for Entry of Default Judgment" being now before the Court and good cause being shown, it is therefore, ORDERED, ADJUDGED AND DECREED that pursuant to Fed.R.Civ.P. 55, judgment is entered against Defendant Silverado Foods Inc. in the amount of $122,549.10 U.S. ($176,736.52 Canadian), together with post-judgment interest on the same.

UNITED STATES DISTRICT JUDGE

Prepared by:

Steven M. Kobos, Esq., OBA No. 14263
NICHOLS, WOLFE, STAMPER, NALLY,
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ATTORNEYS FOR PLAINTIFF

c/mot

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE APR 17 2000

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 99CV1098H(J)
	)	
JOHN W. BRADLEY,	)	
	)	
Defendant.	)	

FILED
APR 14 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEFAULT JUDGMENT

The Plaintiff's Application for Default Judgment comes on for hearing this 14TH day of APRIL, 2000. The Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, John W. Bradley, appears not. The Court finds that pursuant to Rule 55 of the Federal Rules of Civil Procedure, notice of the hearing was given to the Defendant.

The Court gave due consideration to the pleadings and documents filed in support of the plaintiff's Complaint. The Court finds the plaintiff is entitled to judgment from its review of the supporting documentation.

The Court being fully advised and having examined the court file finds that Defendant, John W. Bradley, was served with Summons and Complaint on December 21, 1999. The time within which the Defendant could have answered or otherwise moved as to the

Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, John W. Bradley, for the principal amount of $2,739.97, plus accrued interest of $1,922.76, plus administrative charges in the amount of $6.44, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of $150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 6.197 percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

PHIL PINNELL, OBA # 7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918)581-7463

PEP/llf

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMERICAN PROTECTION INSURANCE COMPANY,

Plaintiff,

vs.

SILVERADO FOODS, INC.,

Defendant.

Case No. 99-CV-0934-H (J)

DEFAULT JUDGMENT

This cause came before the Court on the motion of plaintiff, American Protection Insurance Company ("American"), for a default judgment against defendant, Silverado Foods, Inc., pursuant to Fed. R. Civ. P. 55(b)(1) and ND L.R. 55.1(B). The Clerk of the Court, having reviewed the motion of plaintiff and the affidavit of Thomas M. Ladner, and finding that defendant is in default and has admitted the substantial allegations of the Complaint, finds that the allegations of American are deemed true as set forth in the Complaint, that actual damages have been sustained by American in the amount of $107,089.61, exclusive of interest and costs, and that American is entitled to judgment against Silverado Foods, Inc. for these amounts.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment should be and is hereby entered in favor of American Protection Insurance Company against Silverado Foods, Inc. for actual damages in the total amount of $107,089.61, together with prejudgment interest through April 14, 2000 in the amount of $22,227.37, and post-judgment interest at the prevailing federal rate per annum until paid, and all costs of this action as provided by law.

IT IS SO ORDERED, ADJUDGED AND DECREED this 14th day of April, 2000.

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

Thomas M. Ladner, OBA #5161
NORMAN WOHLGEMUTH CHANDLER & DOWDELL
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ATTORNEYS FOR PLAINTIFF,
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OF COUNSEL:
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J:\Common\mdc\american insurance\default judgment2.wpd

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOOKCLIFFS FUNDING GROUP, L.L.C.,

Plaintiff,

v.

MAN & MACHINE, INC. & CLIFTON BROUMAND,

Defendants.

Case No.99CV0695E(E)

ORDER

Now on this 29th day of March, 2000, this matter comes on before the undersigned Judge for hearing on the Motion to Dismiss or, Alternatively, Motion for Change of Venue of Defendants. The Court grants Defendants' request in part and denies it in part.

Upon finding that this Court lacks personal jurisdiction over the individual Clifton Broumand, Defendants' motion to dismiss the suit against Mr. Broumand is hereby granted. If Plaintiff discovers evidence in the course of this litigation suggesting this Court might have personal jurisdiction over Mr. Broumand, Plaintiff may request this Court to reconsider its ruling.

The Court denies Defendants' motion to dismiss the corporate entity Man & Machine, Inc., finding Man & Machine subject to personal jurisdiction before this Court. Additionally, the Court denies Defendants' motion for a change of venue pursuant to 28 U.S.C. § 1406(a) -- finding venue is proper in the Northern District of Oklahoma as against Man & Machine -- and Defendants' motion for change of venue pursuant to 28 U.S.C. § 1404(a) -- finding the case should not be transferred to the Southern Division of the District of Maryland for the convenience of the parties and witnesses.

In light of the Court's rulings, the parties are ordered to revise their Case Management Plan.

The Revised Case Management Plan should be submitted in fifteen days or on April 13, 2000.

ORDERED this 14th day of ~~March~~ APRIL, 2000.

The Honorable James O. Ellison
District Court Judge

Read and Approved:

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Sarah C. Hartmeyer, OBA # 17641
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MAN & MACHINE, INC. and
CLIFTON BROUMAND

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ATTORNEY FOR PLAINTIFF,
BOOKCLIFFS FUNDING GROUP, L.L.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL R. SANDBORN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 99 CV 0361B(M)
	)	
ORKIN EXTERMINATING, INC.	)	
	)	
Defendant.	)	

STIPULATION FOR DISMISSAL WITH PREJUDICE
OF CLAIMS BY MICHAEL R. SANDBORN

In accordance with Rule 41(a)(1) of the Federal Rules of Civil Procedure, Plaintiff Michael R. Sandborn, with the stipulation of Defendant Orkin Exterminating, Inc., dismisses the within action with prejudice in its entirety.

MICHAEL R. SANDBORN, Plaintiff

Terry A. Hall, Esq., OBA #10668
Patterson Bond, Esq., OBA #942
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ATTORNEYS FOR DEFENDANT, ORKIN EXTERMINATING, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHERIE PIPKIN, CATHY COYAZO, GINGER RENO, CRYSTAL BAKER, ANGELA KINYON, ANNIE MORGAN, JENNIFER PRUETT, CARA RUMLEY, DAINA WHISENHUNT, KELLY BROOKS, ANTHONY JAMAR, SUSAN LITTLEDAVE, BRIAN MURRAY, JEROLD SAPPINGTON, REBA COLENE RAGSDALE, LINDA BROWN, CHERYL WILSON-FUNK, APRIL GARRETT, JARA McCOY, and CAROL SHULL, individuals,

Plaintiffs,

vs.

COMMERCIAL FINANCIAL SERVICES, INC., an Oklahoma corporation, and WILLIAM R. BARTMANN, individually and as an officer, director, agent and representative of Commercial Financial Services, Inc.,

Defendants.

Case No. 98CV-939-B(M)

DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1)(ii), Federal Rules of Civil Procedure, and pursuant to the order of the United States Bankruptcy Court for the Northern District of Oklahoma, Case No. 98-05162-R, modifying the Automatic Stay of 11 U.S.C. § 362(a) dated March 30, 2000, Plaintiffs, by and through their counsel, Maynard I. Ungerman, and Defendant, Commercial Financial Services, Inc., by and through its counsel, Michael C. Redman, hereby dismiss the above lawsuit with prejudice.

Maynard I. Ungerman
Stephen J. Greubel
Ungerman Law Offices
1323 East 71st Street
Tulsa, OK 74136

Lynn Paul Mattson, OBA No. 5795
Michael C. Redman, OBA No. 13340
Shelly L. Dalrymple, OBA No. 15212
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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JESSICA S. SMITH,
SSN: 446-52-7695,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 99-CV-421-M

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated this 14th day of April, 2000.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JESSICA S. SMITH,
SSN: 446-52-7695,

PLAINTIFF,

vs.

KENNETH S. APFEL,
Commissioner of the Social
Security Administration,

DEFENDANT.

CASE NO. 99-CV-421-M

ORDER

Plaintiff, Jessica S. Smith, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[1] In accordance with 28 U.S.C. § 636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. § 405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less

[1] Plaintiff's February 29, 1996 application for benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held May 13, 1997. By decision dated September 15, 1997, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on March 24, 1999. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born April 2, 1952 and was 45 years old at the time of the hearing. [R. 36, 100]. She claims to have been unable to work since February 25, 1996, due to severe back pain. [R. 40, 100, 113]. The ALJ determined that Plaintiff has chronic myofascial strain of the upper and lower back, transient hypertension, musculoskeletal chest pain and a non-severe affective disorder but that she retains the residual functional capacity (RFC) to perform sedentary work with no prolonged standing or walking or quick postural changes. [R.23]. He determined that Plaintiff is unable to do her past relevant work (PRW) as nurses aide, waitress, cook, maid and cashier. [R. 24]. Based upon the testimony of a vocational expert (VE), the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff could perform with the limitations set forth in the RFC determination. The case was thus decided at step five of the five-step evaluative sequence for determining

whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that: (1) the ALJ's credibility findings were not properly linked to the evidence; (2) the ALJ's PRT findings are not supported by the record; and (3) the ALJ failed to give her treating physician's opinions appropriate weight. For the reasons discussed below, the Court affirms the decision of the Commissioner.

Credibility Determination

Plaintiff contends the ALJ's credibility findings were not properly linked to the evidence. The Court disagrees.

To be accepted as credible, a social security claimant's complaints of disabling pain should be consistent with the degree of pain that could reasonably be expected from claimant's determinable medical abnormality. *Hargis v. Sullivan*, 945 F.2d 1482 (10th Cir. 1991). The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The Tenth Circuit has instructed that "[f]indings as to credibility should be closely and affirmatively tied to substantial evidence and not just conclusions in the guise of findings." *Huston v. Bowen*, 838 F.2d 1125, 1133 (10th Cir. 1988).

As correctly cited by Plaintiff, *Kepler v. Chater*, 68 F.3d 387 (10th Cir. 1995) requires the ALJ to address the claimant's complaints of disabling pain and to link his credibility findings to the evidence. Contrary to Plaintiff's contention, this case is distinguishable from *Kepler*, however. In *Kepler*, the Tenth Circuit found the ALJ's credibility determination was inadequate because the ALJ simply recited the general factors he considered and then said the claimant was not credible based on those factors. The ALJ did not refer to any specific evidence relevant to those factors leaving the Court to speculate what specific evidence led the ALJ to find claimant's pain was not disabling. In the instant case, the ALJ did not simply recite the general factors he considered, he also stated what specific evidence he relied on in determining that Plaintiff's allegations of disabling pain were not credible. While the ALJ's written decision is perhaps not as precise as Plaintiff would like, the rationale required by *Kepler* is there.

Before the portion of the ALJ's decision which Plaintiff describes as: "a description of the claimant's testimony, a description of the medical evidence in the record, and a series of conclusory findings as to the RFC and the claimant's credibility" is the following paragraph:

> Because, as to be discussed more fully below, the medical evidence does not contain clinical findings and laboratory tests to support the claimant's allegations of disability, a determination of disability must rest on subjective complaints. Social Security Ruling 96-7p provides a basis for evaluation of such allegations, and those factors will be considered here.

[R. 19].

Following this paragraph, the ALJ discussed Plaintiff's testimony, noting in turn each subjective complaint asserted by Plaintiff. He then discussed the medical portion of the record and explained his understanding of the medical reports and examinations. The ALJ did more than merely recite the record, he identified conflicts between Plaintiff's reported activities of daily living and her complaints of disabling pain, between her complaints of side effects from medication and the lack of medical evidence to substantiate those claims, and the lack of any medical opinion by any treating physician in the record adverse to his findings as to Plaintiff's RFC. [R. 19-21]. After this discussion, the ALJ set forth his conclusion in the paragraph quoted by Plaintiff in her brief.

Contrary to plaintiff's view, *Kepler* does not require a formalistic factor-by-factor recitation of the evidence. So long as the ALJ sets forth the specific evidence he relies on in evaluating the claimant's credibility, the dictates of *Kepler* are satisfied. Here, the ALJ properly discussed the relevant evidence and affirmatively linked his credibility findings to substantial evidence in the record. The Court has reviewed the entire record and concludes that the ALJ's determination that Plaintiff retains the residual functional capacity to perform alternative work is fully supported by substantial evidence.

PRT Findings

Plaintiff complains that the ALJ's findings on the Psychiatric Review Form (PRT)[2] are, as with his credibility finding, conclusory and not adequately discussed in

[2] The procedure for evaluation of a mental impairment is outlined at 20 C.F.R. § 1520a. If a claimant has a mental impairment, the degree of functional loss resulting from the impairment must

his decision. See *Cruse v. United States Dept. of Health & Human Servs.*, 49 F.3d 614 (10th Cir. 1995); *Washington v. Shalala*, 37 F.3d 1437, 1442 (10th Cir. 1994)("there must be competent evidence in the record to support the conclusion recorded on the [PRT] form and the ALJ must discuss in his opinion the evidence he considered in reaching the conclusions expressed on the form."(*quoting Woody v. Secretary of Heath & Human Servs.*, 859 F.2d 1156, 1159 (3rd Cir. 1988)). This complaint is also without merit. The ALJ accurately noted Plaintiff's medical treatment, therapy, and daily activities and gave specific reasons, supported by the record, for his conclusion that her mental disorders have subsided and are non-severe. [R. 19].

Plaintiff points to no evidence that either supports her contention of a disabling mental condition or that contradicts the findings of the ALJ on the PRT. In order to establish a disabling mental impairment, Plaintiff must provide evidence of marked or frequent functional limitations in at least two of the behavior signs set forth in 20 C.F.R. 404, Subpt. P, App. 1, 12.04. Apart from a drug overdose in 1993 which Plaintiff characterized as accidental, there is no evidence that Plaintiff complained of or was treated for depression so severe as to be disabling. [R. 70-72, 167-168]. In fact, Plaintiff testified at the hearing that, other than going through a normal grieving

---

be rated in four areas: (1) activities of daily living, (2) social functioning, (3) concentration, persistence or pace; and (4) deterioration or decompensation in work or work-like settings. 20 C.F.R. §1520a(b)(3). If each of the four areas is rated as having an impact of "none", "never", "slight", or "seldom", the conclusion is that the impairment is not severe, unless the evidence otherwise indicates there is significant limitation of the claimant's mental ability to do basic work activities. See 20 C.F.R. §1520a(c)(1). An ALJ must attach to his decision a PRT form detailing his assessment of the claimant's level of mental impairment. 20 C.F.R. §1520a(d). In this case, Plaintiff's physician, Dr. Stewart also filled out a PRT form which was submitted to the ALJ at the hearing and made part of the record at pages 178-190.

process after the deaths of her father and grandchild, she had no depression, anxiety or other mental problems. [R. 71-72]. The ALJ concluded, and the Court agrees, that the evidence does not support a finding of disability based upon depression. The Court finds that the ALJ adequately discussed the evidence he considered in reaching the conclusions expressed on the PRT form.

Treating Physician's Reports

Plaintiff claims the ALJ disregarded her treating physician's opinion and that he failed to give specific, legitimate reasons for doing so. *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987); 20 C.F.R. 416.927(d)(a treating physician's opinion, if it is well supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in claimant's record must be given controlling weight); see also *Castellano*, 26 F.3d at 1029. If the opinion of the claimant's physician is to be disregarded, specific, legitimate reasons for this action must be set forth. *Frey*, 816 F.2d at 512. Plaintiff claims the ALJ ignored a diagnosis of "evolving" rheumatoid arthritis. She misrepresents the evidence in the record. Plaintiff's treating physicians at Claremore Indian Hospital ordered a "Rheumatoid Arthritis Workup" on November 16, 1995, after recording Plaintiff's complaints of neck and back pain. [R. 161]. On February 27, 1996, a nurse writing up the intake report for treatment of an allergic reaction to medication for skin lesions noted a "history of Rheumatoid arthritis." [R. 155]. On May 3, 1996, "Rheumatoid arthritis - evolving" was listed as the purpose of Plaintiff's visit to the clinic on May 3, 1996. [R. 154]. However, on August 28, 1996, a note made during Plaintiff's check up

reads: "RA - neg" and the purpose of the visit is recorded as "back pain" and "hepatitis, type undetermined." [R. 151]. Subsequent treatment records from the clinic all report Plaintiff's medical problems as hepatitis and "back pain." [R. 148-150]. Contrary to Plaintiff's allegation, no "diagnosis" of rheumatoid arthritis was ever confirmed by any of Plaintiff's treating physicians but rather, was suspected and then ruled out. At any rate, it is clear the ALJ did not ignore Plaintiff's treating physicians' records or the DDU examiner's assessment, as he included restrictions in Plaintiff's RFC designed to accommodate Plaintiff's back limitations due to back pain. The Court finds the ALJ gave proper consideration and weight to the opinions of Plaintiff's physicians.

Conclusion

The Court finds that the ALJ evaluated the record in accordance with the legal standards established by the Commissioner and the courts. The Court further finds there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

SO ORDERED this 14th day of April, 2000.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

RNB/slc

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EXCESS INSURANCE COMPANY, LTD., PHOENIX ASSURANCE P.L.C. (LONDON ASSURANCE), OCEAN MARINE INSURANCE COMPANY, LTD., SOVEREIGN MARINE & GENERAL INSURANCE COMPANY, LTD., MINSTER INSURANCE COMPANY, LTD., PHOENIX ASSURANCE P.L.C. (ALLIANCE ASSURANCE CO.), NORWICH UNION FIRE INSURANCE SOCIETY LTD., HANSA MARINE INSURANCE COMPANY (UK) LTD.,VESTA (UK) INSURANCE COMPANY LTD., PRUDENTIAL ASSURANCE COMPANY, LTD., CORNHILL INSURANCE P.L.C. and ALLIANZ INTERNATIONAL INSURANCE COMPANY LTD.

Plaintiffs,

vs.

UGLY JOHN'S CUSTOM BOATS, INC., d/b/a UGLY JOHN'S CUSTOM BOATS, WESTPORT MARINA AND THUNDER BAY, JOHN M. MULLEN AND VELMA D. MULLEN

Defendants.

Case No. 98 CV 0073H (W)

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiffs, Excess Insurance Company, Ltd., Phoenix Assurance P.L.C. (London Assurance), Ocean Marine Insurance Company, Ltd., Sovereign Marine & General Insurance Company, Ltd., Minster Insurance Company, Ltd., Phoenix Assurance P.L.C. (Alliance Assurance Co), Norwich Union Fire Insurance Society Ltd., Hansa Marine Insurance Company, (UK) Ltd., Vesta (UK) Insurance Company, Ltd., Prudential Assurance Co. Ltd., Cornhill Insurance P.L.C., and Allianz International Insurance Company, Ltd., (Underwriters), and Defendants, Ugly John's Custom Boats, Inc. d/b/a Ugly John's Custom Boats Westport Marina and Thunder Bay, John M.

DIB CIS

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Mullen and Thelma D. Mullen, pursuant to Rule 41(a)(1)(ii) stipulate that this case is hereby dismissed with prejudice.

Respectfully submitted,

SECREST, HILL & FOLLUO

By: _____

JAMES K. SECREST, II, OBA #8049
ROGER N. BUTLER, JR., OBA #13668
7134 South Yale, Suite 900
Tulsa, OK 74136-6342
(918) 494-5905
(918) 494-2847 (facsimile)

ATTORNEYS FOR PLAINTIFFS

FRASIER, FRASIER & HICKMAN

By: _____

MR. JAMES E. FRASIER, OBA #3108
1700 S. W. Boulevard
P.O. Box 799
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(918) 583-5637 (facsimile)

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing document was deposited in the U.S. Mail this 27th day of June 2000, with proper postage thereon fully prepaid and addressed to:

Mr. Roger N. Butler, Jr.
7134 S. Yale, Suite 900
Tulsa, OK 74136 6342

misc\95015\p\dwp

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GABRIEL ARNAZ ALEXANDER,

Plaintiff,

v.

METRIS DIRECT, INC.,

Defendants.

Case No. 99-CV-0598-H

ADMINISTRATIVE CLOSING ORDER

The parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

The parties are ordered to notify the Court within thirty days from the file date of this order as to whether this matter should be reopened or dismissed with prejudice. If the parties have not by appropriate motion reopened this matter at the conclusion of that thirty-day period, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 12TH day of April, 2000.

Sven Erik Holmes
United States District Judge

15

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GARLAND L. KENT JR.,

Plaintiff,

v.

PONCA TRIBE OF OKLAHOMA,

Defendant.

Case No. 99-CV-360-H

ORDER

This matter comes before the Court pursuant to the Court's minute order of March 10, 2000. In its minute order, the Court noted that the parties had failed to comply with the Court's order of September 21, 1999, requiring them to file a case management plan. The Court therefore directed the parties to file a case management plan on or before March 30, 2000, and instructed them that the failure to do so would result in a dismissal of the case without prejudice. To date, the parties have not filed a case management plan. Accordingly, pursuant to the Court's minute order of March 10, 2000, this case is hereby dismissed without prejudice.

IT IS SO ORDERED.

This 13TH day of April, 2000.

Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	ENTERED ON DOCKET
	)	DATE APR 14 2000
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO.
	)	99CV0426H(J)
MARY C. HENRY,	)	
	)	
Defendant.	)	
	)	

AGREED JUDGMENT

This matter comes on for consideration this 12th day of April, 2000, the Plaintiff, United States of America, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Mary C. Henry, appearing with her attorney, Richard D. Amatucci.

The Court, being fully advised and having examined the court file, finds that the Defendant, Mary C. Henry, acknowledged receipt of Summons and Complaint on June 29, 1999. The Defendant has not filed an Answer but in lieu thereof has agreed that Mary C. Henry is indebted to the Plaintiff in the amount alleged in the Complaint and that judgment may accordingly be entered against Mary C. Henry in the principal amounts of $1,872.03 and $1,630.69, plus accrued interest in the amounts of $1,669.02 and $2,039.70, plus interest thereafter at the rates of 9.13% and 9% per annum until judgment, plus filing fees in the amount of $150.00, plus interest

thereafter at the current legal rate until paid, plus the costs of this action.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the defendant in the principal amounts of $1,872.03 and $1,630.69, plus accrued interest in the amounts of $1,669.02 and $2,039.70, plus interest thereafter at the rates of 9.13% and 9% per annum until judgment, plus filing fees in the amount of $150.00, plus interest thereafter at the current legal rate of 6.197 until paid, plus the costs of this action.

UNITED STATES DISTRICT JUDGE

APPROVED;

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

PHIL PINNELL
Assistant United States Attorney

MARY C. HENRY

RICHARD D. AMATUCCI
Attorney for Defendant

PEP/llf

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TERESA McCRADY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 99-CV-523-J**
	)	
KENNETH S. APFEL,	)	
Commissioner,	)	
Social Security Administration,	)	
	)	
Defendant.	)	

RULE 58 FINAL JUDGMENT

This action has come before the Court for consideration upon an unopposed Motion for Remand for Further Administrative Action. An Order remanding the case to the Commissioner has been entered.

The Court enters this Final Judgment under Fed. R. Civ. P. 58 remanding this case to the Commissioner for further administrative action.

THUS DONE AND SIGNED on this 13 day of April 2000.

United States Magistrate Judge

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

APR 1 3 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TERESA McCRADY,

Plaintiff(s),

vs.

KENNETH S. APFEL, Commissioner, Social Security Administration,

Defendant(s).

Case No. 99-CV-523-J

ENTERED ON DOCKET

DATE APR 14 2000

ORDER

Defendant has filed a motion to remand this case pursuant to sentence 4 of 42 U.S.C. § 405(g). [Doc. No. 14]. Plaintiff has no objection. Defendant's motion is, therefore, **GRANTED**. This action is hereby remanded to the Commissioner for further administrate action. See Melkonyan v. Sullivan, 501 U.S. 89 (1991).

The Commissioner requests that, upon remand, the ALJ properly document (1) the credibility findings, (2) the determination of the claimant's residual functional capacity, and (3) the step four determination, including the physical and demands of the claimant's past relevant work and her ability to meet those demands. In addition, the Commissioner requests that the ALJ follow the steps required by regulation 20 C.F.R. § 404.1594 for determining medical improvement.

IT IS SO ORDERED.

Dated this 13th day of April 2000.

Sam A. Joyner
United States Magistrate Judge

15

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RONNIE E. REED,	)	
SSN: 442-60-2611,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 99-CV-0173-EA**
	)	
KENNETH S. APFEL, Commissioner,	)	
Social Security Administration,	)	
	)	
Defendant.	)	

JUDGMENT

This action has come before the Court for consideration and an Order reversing and remanding the case to the Commissioner has been entered. Judgment for the plaintiff and against the defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 13th day of April, 2000.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RONNIE E. REED,	)	
SSN: 442-60-2611,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 99-CV-0173-EA**
	)	
KENNETH S. APFEL, Commissioner,	)	
Social Security Administration,	)	
	)	
Defendant.	)	

ORDER

Claimant, Ronnie E. Reed, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration ("Commissioner") denying claimant's application for disability benefits under the Social Security Act. In accordance with 28 U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Tenth Circuit Court of Appeals. Claimant appeals the decision of the Administrative Law Judge ("ALJ") and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **REVERSES and REMANDS** the Commissioner's decision.

Social Security Law and Standard of Review

Disability under the Social Security Act is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . ." 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his "physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any

other kind of substantial gainful work in the national economy . . . ." Id. § 423(d)(2)(A). Social Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. §§ 404.1520, 416.920.[1]

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). This Court's review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted). The term substantial evidence has been interpreted by the U.S. Supreme Court to require "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The Court may not reweigh the evidence nor substitute its discretion for that of the agency. Casias v. Secretary of Health & Human Servs., 933 F.2d 799, 800 (10th Cir. 1991). Nevertheless, the court must review the record as a whole, and "the substantiality of the evidence

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[1] Step one requires claimant to establish that he is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510, 416.910. Step two requires that claimant establish that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See id. §§ 404.1521, 416.921. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with certain impairments listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1. A claimant suffering from a listed impairment or impairments "medically equivalent" to a listed impairment is determined to be disabled without further inquiry. If not, the evaluation proceeds to step four, where claimant must establish that he does not retain the residual functional capacity (RFC) to perform his past relevant work. If claimant's step four burden is met, the burden shifts to the Commissioner to establish at step five that work exists in significant numbers in the national economy which claimant--taking into account his age, education, work experience, and RFC--can perform. Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work. See generally Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

must take into account whatever in the record fairly detracts from its weight." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); see also Casias, 933 F.2d at 800-01.

Claimant's Background

Claimant was born on August 3, 1955, and was 41 years old on the date he was last insured, December 31, 1996. He has a high school education and past relevant work experience as a machinist, roustabout, welder, and tire repairer. Claimant alleges an inability to work beginning November 1, 1991, and continuing through March 29, 1994. He claims to suffer from scoliosis of the spine, degenerative arthritis, bursitis, muscle spasms, curved ribs, back pain, shoulder pain, hip pain, leg weakness, hand weakness, and respiratory problems.

Procedural History

On December 10, 1992, claimant protectively filed an application for disability benefits under Title II (42 U.S.C. § 401 et seq.). Claimant's application was denied in its entirety initially and on reconsideration. A hearing before ALJ John M. Slater was held March 11, 1994, in Tulsa, Oklahoma. By decision dated March 24, 1994, ALJ Slater found that claimant was not disabled at any time through the date of the decision. On October 27, 1994, the Appeals Council denied claimant's request for review. Claimant filed a complaint in the Northern District of Oklahoma, and the Court reversed and remanded the case on December 26,1996.

On remand, ALJ R. J. Payne held a hearing on September 15, 1997 and issued a decision dated March 20, 1998, in which he found that claimant was not disabled at any time prior to March 29, 1994, but was disabled after that date. Claimant appealed the decision, and, on December 29, 1998, the Appeals Council declined to assume jurisdiction. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. § 404.984(b).

Decision of the Administrative Law Judge

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that, prior to March 29, 1994, claimant had the residual functional capacity (RFC) to perform a wide range of light work, subject to only occasional stooping, crouching, or bending; infrequent kneeling, or crawling; no balancing; only occasional climbing of ramps or stairs; infrequent climbing of ladders, ropes, or scaffolds; no work around unprotected heights; no vibration affecting the right arm; no work on uneven surfaces; and no repetitive reaching or prolonged overhead work. The ALJ determined that claimant could not perform his past relevant work, but there were other jobs existing in significant numbers in the national and regional economies that he could perform, based on his RFC, age, education, and work experience. Thus, the ALJ concluded that claimant was not disabled prior to March 29, 1994, but that he was disabled on and after March 29, 1994.

Review

Claimant asserts the following as error: (1) the ALJ failed to find that claimant's impairments prevented him from performing a full range of sedentary work prior to March 24, 1994; (2) the ALJ did not perform a proper pain and credibility analysis; and (3) the ALJ improperly concluded that claimant did not suffer from a mental impairment prior to March 24, 1994.

Onset Date

Claimant's brief states that the ALJ decision found claimant disabled on March 24, 1994, and claimant "now appeals alleging November 1, 1991, as the correct onset date of disability." (Cl. Br., Docket # 11, at 1.) March 24, 1994, is the date of the earlier decision in which ALJ Slater found that claimant was not disabled. That decision was reversed and remanded by the Northern District of Oklahoma on December 26, 1996. It is not the date of the decision now under review. The more

recent decision is dated March 20, 1998, and in that decision, ALJ Payne found that claimant was disabled on and after March 29, 1994, the date of a definitive RFC determination by claimant's treating physician, Wesley M. Ingram, D.O. It is not clear why claimant confuses these two dates and argues that substantial medical evidence establishes that claimant's impairments prevented him from performing a full range of sedentary work prior to March 24, 1994, instead of March 29, 1994. Without some legitimate explanation for the inconsistency, the Court will review whether ALJ Payne erred in choosing March 29, 1994, as the appropriate onset date.

Claimant relies on reports by Thomas A. Chandy, M.D., and Dr. Ingram as evidence that claimant was disabled before March 29, 1994. On February 17, 1992, Dr. Chandy reviewed an x-ray showing that claimant had scoliosis of 50 degrees between T/7 and L/1 levels of his spine with convexity to the right, and 15 degrees between L/1 and L4 with convexity to the left. Claimant's spine had an "s" shaped curve and the x-ray showed moderate degenerative arthritis of the entire spine with narrowing of the disk space in the lower lumbar spine. (R. 87) Claimant used a cane and lurched slightly to the right when he walked. He told Dr. Chandy that he was tender over almost the entire spine and that he had mild to moderate muscle spasm. At times he also had shortness of breath. Dr. Chandy noted that claimant's spine movement was limited by about 60%. He gave claimant exercises and remarked that claimant may have had some compromise in his lung function because of the curve pressing on the lung. (Id.) He stated:

> The patient is totally disabled from doing heavy physical work. If the patient is able to get Vocational Rehab he may be able to do an office type of work on a limited basis, he may not be able to sit for eight hours at a time but he can sit most of the day, however he would not be able to do any physical work and from a physical work standpoint he is totally disabled.

(R. 87-88) This diagnosis does not necessarily indicate that claimant is disabled under the Social Security regulations. See 20 C.F.R. § 404.1567. The ALJ read it to indicate that claimant was restricted from performing heavy work. (R. 191)

Dr. Ingram observed on March 30, 1993, that claimant was able to walk with little difficulty, and he was able to sit and stand with only minimal difficulty. Dr. Ingram deemed claimant "able to lift and carry things as long as they are not excessive in weight, such as over 50 to 75 pounds." (R. 129) He could hear and speak with minimal difficulty. His memory, sustained concentration and persistence were intact, but his social interaction was limited. Dr. Ingram thought that claimant could "adapt very well to any setting as far as training, etc." He stated: "I believed the patient cannot perform heavy labor or associated jobs, but I believe that he could be retrained for a desk job if this did not aggravate his scoliosis too much." (Id.)

On May 19, 1993, Dr. Ingram reported that claimant also had increased pain in his right hip and sacroiliac joints and decreased ambulation abilities. Dr. Ingram did not order x-rays, but assumed that claimant had early degenerative joint disease. He remarked: "This adds to his above disabilities [severe scoliosis of his thoracolumbar area and chronic degenerative joint disease of his right shoulder] and his inability to perform as a functioning worker." (R. 130) This ambiguous statement does not necessarily indicate that Dr. Ingram considered claimant unable to perform any substantial gainful activity, as that term is defined by the Social Security regulations. It was not until March 29, 1994, that Dr. Ingram completed an RFC form which indicates that claimant could not stand, sit, or walk for any significant period of time. (R. 151-53) For that reason, the ALJ considered claimant disabled as of that date. (R. 193)

Claimant argues that the May 1993 report was based on the same medical evidence as the March 1993 report, and the March 1994 RFC is based on the same information as the March 1993 report with the exception of imbalance. (Cl. Br., Docket # 11, at 4). Claimant then takes two of the ALJ's remarks out of context and fashions an argument that, if the ALJ "gave full weight" (R. 191-92) to Dr. Ingram's "original estimation" (R. 193) that claimant could not perform the full range of sedentary work, then March 1994 cannot be the correct onset date of disability. (Cl. Br., Docket #11, at 4). A close reading of the ALJ's decision, however, indicates that the ALJ's reference to the "original estimation" (R. 193) was to Dr. Ingram's March 1994 RFC, and he considered the "current medical evidence," an RFC completed by Terry L. Hoyt, D.O., on September 15, 1997 (R. 303-05), to be consistent with it. (R. 193) That is the reason the ALJ determined that the appropriate onset date was March 29, 1994. The fact that the ALJ gave "full weight" to Dr. Ingram's opinions (R. 191-92) does not mean that he was obliged to find claimant disabled prior to March 29, 1994, given the reports by Dr. Ingram prior to that date which did not indicate unequivocally that claimant could not perform any substantial activity.

Pain and Credibility

Unfortunately, the ALJ did not perform a proper pain and credibility analysis. The framework for the proper analysis of evidence of allegedly disabling pain was set forth by the Tenth Circuit in Luna v. Bowen, 834 F.2d 161, 163-64 (10th Cir. 1987). That analysis requires consideration of:

> (1) whether Claimant established a pain-producing impairment by objective medical evidence; (2) if so, whether there is a "loose nexus" between the proven impairment and the Claimant's subjective allegations of pain; and (3) if so, whether, considering all the evidence, both objective and subjective, Claimant's pain is in fact disabling.

Musgrave v. Sullivan, 966 F.2d 1371, 1376 (10th Cir. 1992); accord Kepler v. Chater, 68 F.3d 387, 390 (10th Cir. 1995). The factors that an ALJ should consider when determining the credibility of subjective complaints of pain include, but are not limited to, "the levels of medication and their effectiveness, the extensiveness of attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence." Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991) (quoting Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988)); accord Luna, 834 F.2d at 165-66 (citations omitted). The ALJ must explain why the specific evidence relevant to each factor led him to conclude that the claimant's subjective complaints were not credible. Kepler, 68 F.3d at 391.

The ALJ did not fully consider claimant's subjective complaints of disabling pain. He specifically referenced the parameters and the criteria set forth in Luna, as well as 20 C.F.R. §§ 404.1529, 416.929 and Social Security Ruling 96-7p. (R. 191) However, his analysis consists of listing and stating that he considered the factors in 20 C.F.R. §§ 404.1529, 416.929[2] and concluding: "After such due considerations, I find that the claimant's allegations are not fully credible because, but not limited to, the objective findings, or the lack thereof, by treating and examining physicians,

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[2] The factors listed in 20 C.F.R. §§ 404.1529, 416.929 include the following: claimant's daily activities; the location, duration, frequency, and intensity of any pain or other symptoms; factors that precipitate and aggravate the symptoms; the type, dosage, effectiveness, and side effects of any medication the claimant takes or has taken to alleviate pain or other symptoms; treatment, other than medication, the claimant receives or has received for relief of pain or other symptoms; any measures other than treatment the claimant uses or has used to relieve pain or other symptoms; and any other factors concerning the claimant's functional limitations and restrictions due to pain or other symptoms.

the lack of medication for severe pain, the frequency of treatments by physicians and the lack of discomfort shown by the claimant at the hearing." (R. 191) This conclusory statement does not satisfy the factor-by-factor analysis contemplated by the Tenth Circuit or the Social Security regulations and rulings. The case was remanded in 1996 for the purpose of express findings in accordance with Luna (R. 249-52), which the ALJ failed to make. Moreover, there is evidence that could be viewed as supporting claimant's contention. (See R. 106-16, 127-28, 141, 142, 162-73) As in Kepler, "the link between the evidence and credibility determination is missing; all we have is the ALJ's conclusion." 68 F.3d at 391.

The ALJ followed his conclusory statement with a paragraph discussing the opinions of Dr. Chandy and Dr. Ingram regarding claimant's functional limitations prior to March 29, 1994. (R. 191-92) The paragraph also includes a statement regarding the absence of evidence indicating that claimant had any mental impairment prior to April 28, 1997. (R. 192) However, there is no indication that this paragraph is part of the ALJ's pain and credibility analysis, or, if it is, which factor it addresses. Credibility determinations made by an ALJ are generally entitled to great deference. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). "Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence." Diaz v. Secretary of Health and Human Servs, 898 F.2d 774, 777 (10th Cir. 1990); Social Security Ruling 82-59, 1982 WL 31384. The ALJ's credibility determination, in this instance, is not supported by substantial evidence.

Evaluating Mental Impairments

Finally, claimant challenges the ALJ's conclusion that claimant did not suffer from a mental impairment prior to March 24, 1994. (Cl. Br., Docket # 11, at 5.) Again, the ALJ found that claimant

was not disabled prior to March 29, 1994. He specifically stated that he found no evidence that claimant had any mental impairment prior to April 28, 1997.[3] (R. 192) Claimant argues that claimant's diagnosis of depression on one office visit to Dr. Ingram in 1993 (R. 139) and his taking of psychotropic medications indicates that he has a mental impairment. (Cl. Br., Docket # 11, at 5.)

The Tenth Circuit requires an ALJ to follow the procedure in 20 C.F.R. § 404.1520a when he or she evaluates mental impairments that allegedly prevent a claimant from working. See Winfrey 92 F.3d 1017, 1024 (10th Cir. 1996); Cruse v. United States Dep't of Health & Human Servs., 49 F.3d 614, 617 (10th Cir. 1994). The procedure first requires the ALJ to determine the presence or absence of certain medical findings pertaining to claimant's ability to work. Next, the ALJ is to evaluate the degree of functional loss resulting from claimant's impairment. The ALJ must then complete a Psychiatric Review Technique ("PRT") form and attach it to a written decision in which he or she discusses the evidence upon which the conclusions expressed on the form are based. Winfrey, 92 F.3d at 1024; Cruse, 49 F.3d at 617-18; see also Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994).

The claimant never alleged in his application for disability benefits, request for reconsideration, request for hearing, or at hearing that his depression was disabling. There is no indication any of the medications he took were prescribed to treat his depression. At the first step of the procedure outlined above, the ALJ properly determined the absence of certain medical findings pertaining to claimant's ability to work. He stated:

> There is no significant and continuing evidence of a mental impairment. The occasional and non-continuing prescription of medication does not show the existence of a mental impairment, particularly when there is no objective medical

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[3] Dr. Hoyt diagnosed claimant as having generalized anxiety disorder on that date. (R. 297)

> evidence showing a meeting of the established diagnostic criteria necessary to support a diagnosis of any mental impairment. The mere naming of a mental disorder as a diagnosis, without more, does not establish it as a significant impairment.

(R. 193) Thus, the ALJ did not err in his conclusion that claimant did not suffer from a mental impairment prior to March 29, 1994.

Conclusion

Nonetheless, the ALJ's failure to properly consider claimant's subjective complaints of disabling pain is reversible error. The decision of the Commissioner is not supported by substantial evidence and the correct legal standards were not applied. If the Commissioner "failed to apply the correct legal test, there is ground for reversal apart from a lack of substantial evidence." Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993) (citation omitted). The ALJ's decision in this case may ultimately turn out to be correct, and nothing in this order is to be taken to suggest that the Court has presently concluded otherwise. This remand "simply assures that the correct legal standards are invoked in reaching a decision based on the facts of this case." Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988). The decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

DATED this 13th day of April, 2000.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILMA BOZWORTH,
SSN: 445-60-4950

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,

Defendant.

FILED

APR 12 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 99-CV-267-J

ENTERED ON DOCKET

DATE APR 13 2000

JUDGMENT

This action has come before the Court for consideration and an Order reversing the Commissioner's decision and remanding the case to the Commissioner for an entry of benefits has been entered. Consequently, Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 12th day of April 2000.

Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILMA BOZWORTH,
SSN: 445-60-4950

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,

Defendant.

No. 99-CV-267-J

ORDER[1/]

Plaintiff, Wilma Bozworth, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.[2/] Plaintiff asserts that the Commissioner erred because (1) the ALJ's opinion does not contain a proper credibility analysis and is not supported by substantial evidence, and (2) the ALJ inappropriately relied on the "absence of evidence." For the reasons discussed below, the Court **REVERSES AND REMANDS FOR THE ENTRY OF BENEFITS** the decision of the Commissioner.

1/ This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

2/ Plaintiff had an initial hearing before Administrative Law Judge Glen E. Michael on March 16, 1995. The ALJ concluded that Plaintiff was not disabled by decision dated April 3, 1995. [R. at 13]. Plaintiff appealed to the Appeals Council, and appealed the Appeals Council decision to District Court. The District Court reversed the decision of the Commissioner by Order dated February 24, 1997 [r. at 324], and remanded the action for an evaluation of Plaintiff's credibility. Plaintiff had a second hearing before Administrative Law Judge ("ALJ") James S. Russell. By Order dated August 21, 1998, the ALJ concluded that Plaintiff was not disabled. [R. at 261]. The Appeals Council declined Plaintiff's request for review on February 27, 1999. [R. at 249].

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was born January 13, 1957. [R. at 271]. Plaintiff completed the tenth grade, and obtained her GED. [R. at 293]. Plaintiff was 38 years old at the time of the first hearing before the ALJ, and 41 years old at the time of her second hearing before the ALJ. [R. at 17, 293].

Plaintiff worked in a restaurant until November 3, 1993. According to Plaintiff, she was forced to stop working because of intense pain in her legs. [R. at 50]. Plaintiff has been diagnosed with peripheral neuropathy as a complication to Plaintiff's diabetes. [R. at 51]. Plaintiff was treated at the Mayo Clinic, and their diagnosis was a painful diabetic small fiber neuropathy. [R. at 52]. According to Plaintiff, she suffers from pain in her legs 24 hours a day, and nothing relieves the pain. [R. at 53]. Plaintiff claims she has tried numerous medications, but that nothing works. [R. at 53]. At the first hearing before the ALJ, Plaintiff testified that she would be able to lift approximately 10 pounds. [R. at 59].

A RFC completed May 2, 1994, indicated Plaintiff could lift 50 pounds occasionally, 25 pounds frequently, and stand or walk for six out of eight hours. [R. at 75]. A RFC completed August 4, 1994, indicated Plaintiff could occasionally lift ten pounds, frequently lift five to ten pound, and stand two out of eight hours. [R. at 93].

A social security examiner noted that Plaintiff walked slowly, moved carefully, and appeared neat and friendly. Plaintiff was described as 5'5" tall and weighing 200 pounds. [R. at 122-23].

The record contains numerous visits by Plaintiff to doctors regarding Plaintiff's pain, stiffness, and tenderness in her legs. [R. at 140 - 150].

An examiner in March of 1994 noted that Plaintiff's symptoms had progressed despite adequate control of her diabetes. [R. at 160].

At an examination on April 11, 1994, Plaintiff's condition was described as a burning paresthesia in her lower legs. [R. at 153]. Plaintiff complained that the pain became increasingly worse until November 1993, when the pain became constant. [R. at 153]. The examiner noted that Plaintiff had difficulty with the heel/toe walk, appeared to be in pain, and that her strength was limited by pain. [R. at 153].

A physician note in April 1994 indicates that despite medications, Plaintiff experienced no pain relief. [R. at 210]. Plaintiff was referred to physicians at the Mayo Clinic. [R. at 210].

At the second hearing before the ALJ, Plaintiff testified that she received no relief from medications, and was left with only Tylenol for pain relief. Plaintiff acknowledged that Tylenol did little to relieve her pain. [R. at 274].

Examiners at the Mayo Clinic reported no evidence of peripheral neuropathy, but suggested Plaintiff's symptoms were suggestive of early diabetic autonomic neuropathy. [R. at 166].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims. See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).[3/]

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir.

[3/] Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary[4/] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when he uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

[4/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

III. THE ALJ'S DECISION

By decision dated April 3, 1995, ALJ Glen E. Michael concluded that Plaintiff was not disabled. Plaintiff appealed that decision to the District Court. This Court reversed the Commissioner's decision, by Order filed February 24, 1997. [R. at 324]. On remand, the Commissioner was to evaluate Plaintiff's complaints of pain and provide specific reasons, considering Kepler v. Chater, 68 F.3d 387 (10th Cir. 1995), for discounting Plaintiff's complaints.

On remand, the case was decided by a different ALJ. ALJ James Stephan Russell, by Order dated August 21, 1998, concluded that Plaintiff was not disabled. [R. at 261]. At some time before the District Court remand (on Plaintiff's first application for benefits) and subsequent decision by ALJ Russell, Plaintiff filed for and was granted social security benefits on a second social security application. Plaintiff was granted benefits as of October 30, 1995. Therefore, in the application considered by ALJ Russell, and currently appealed by the Plaintiff, the issue as to Plaintiff's disability is concerned solely with the time frame from November 1993 until October 1995.

The ALJ summarized Plaintiff's medical record. The ALJ concluded that Plaintiff's impairments limited her to sedentary work with a sit and stand option every sixty minutes. [R. at 273]. The ALJ summarized Kepler. The ALJ summarized the Plaintiff's testimony. The ALJ concluded that Plaintiff was not disabled at Step Five of the sequential evaluation.

IV. REVIEW

The facts of this case are familiar to this Court because Plaintiff appealed a previous decision of the Commissioner to this Court. The Court concluded, in 1995, that the ALJ had failed to properly address Plaintiff's complaints of pain considering Kepler. The Court noted the requirements of Kepler, and the fact that Kepler was decided after the previous ALJ concluded that Plaintiff was not disabled. That case was remanded to the Commissioner to enable the ALJ to make more detailed findings with regard to Plaintiff's credibility and her subjective complaints of pain.

In the previous remand Order, this Court provided fairly specific instructions to the Commissioner with regard to assessing Plaintiff's credibility.

> The Court must determine whether this [ALJ's] credibility analysis comports with the Tenth Circuit's holdings in Kepler v. Chater, 68 F.3d 387 (10th Cir. 1995) and Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). Plaintiff argues that it does not. In particular, Plaintiff argues in her brief that "the ALJ must show in his opinion that he applied the correct legal standard by articulating specific reasons for rejecting a claimant's testimony and by linking his credibility findings to substantial evidence. Such documentation is necessary to assure that the individual had a full and fair review of her claim. The ALJ breached this duty." Plaintiff's Brief, p. 3 (citations omitted).
>
> Plaintiff alleges that the ALJ failed to adequately evaluate Plaintiff's complaints of pain. The familiar nexus test in Luna was developed as a guide to explain when an ALJ must consider subjective complaints of pain. If the nexus between pain-producing impairment and alleged pain can be established, Luna requires that an ALJ consider the claimant's subjective complaints of pain.
>
> When the ALJ reaches the last step of Luna and considers subjective complaints of pain, he is still entitled to

judge the credibility of the claimant in light of all other evidence. Luna, 834 F.2d at 161-63. The ALJ's credibility determinations are entitled to great deference by this Court. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992). Even if the ALJ finds the claimant to be credible, the mere existence of pain is insufficient to support a finding of disability. Claimant's pain must be "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988). "Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment." Id.

The ALJ reached the last step of the Luna analysis, because he considered Plaintiff's subjective complaints of pain. The ALJ concluded, however, that Plaintiff's allegations of disabling pain were not credible. This conclusion shall be affirmed on appeal if it is supported by substantial evidence. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). In assessing the credibility of a claimant's subjective complaints of pain, the following factors should be considered.

> [T]he levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991). In Kepler, the Tenth Circuit made it clear that an ALJ's credibility determination cannot be conclusory (i.e., "I find the claimant's testimony not credible."). An ALJ, using the Hargis factors, must give detailed reasons, with reference to specific evidence in the record, for his credibility determinations. Kepler, 68 F.3d at 390-92. In particular,

> findings as to credibility should be closely and affirmatively linked to substantial evidence and not just a conclusion in the guise of findings. Id.
>
> This Court has an appreciation for the fact that determinations regarding another person's credibility are often made at an instinctual (i.e., gut) level. The Court also appreciates the fact that these instinctual reactions regarding the believability of a person are often difficult to quantify and articulate. In the context of daily living, most of us make credibility determinations everyday. We choose who and what to believe and who and what not to believe, and we are very rarely asked to articulate the specific reasons that caused us to believe one person and doubt another. The same rules cannot, however, apply in the administrative hearing context. Administrative agencies must give reasons for their decisions. Reyes v. Bowen, 845 F.2d 242, 244 (10th Cir. 1988).
>
> The Court is persuaded that the ALJ's credibility analysis, as quoted above, is not sufficient to pass muster under Kepler. In the ALJ's defense, however, the Court points out that Kepler was decided in October 1995, six months after the ALJ rendered his decision in this case. Initially, the Court finds the ALJ's credibility determination insufficient because he did not discuss many of the factors listed in Hargis and Luna. The Court also finds that the factors actually discussed by the ALJ do not provide substantial evidence for his credibility determination.

See [R. at 324, February 24, 1997 District Court Order].

This Court concluded, in the previous appeal, that the ALJ had not adequately addressed Plaintiff's complaints of pain and had not provided a sufficient analysis of Plaintiff's credibility. This Court remanded the action to the Commissioner to permit the Commissioner a second chance. Plaintiff asserts that the second ALJ failed to comply with Luna and Kepler.

Plaintiff is correct. ALJ Russell provides virtually no analysis of Plaintiff's credibility. The prior order of the Court was clear. To uphold a decision of the Commissioner which discounts a Plaintiff's subjective complaints, the ALJ must provide specific reasons for discounting Plaintiff's credibility. In this case, the ALJ utterly failed to comply with either Kepler or this Court's prior Court order.

The following excerpts contain the ALJ's entire analysis with regard to Plaintiff's credibility.

> The Administrative Law Judge finds the above-cited residual functional capacity is supported by the substantial medical evidence, and that the performance of work activities with those limitations would not precipitate or exacerbate the claimant's condition. The clamant has alleged severe disabling pain to the extent that she cannot engage in any work activities. In making the determination set forth above, the claimant's subjective complaints have been given full consideration, both individually and in combination. The record contains no assessment by a treating physician or examining specialist that is inconsistent with sedentary work activity with the previously-mentioned restrictions. The claimant's daily activities are consistent with the performance of sedentary work.
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> * * * *
>
> The claimant has non-insulin dependent diabetes mellitus, and has been diagnosed with peripheral neuropathy. The Administrative Law Judge does not minimize the claimant's current physical condition; however, a preponderance of the medical evidence conclusively shows that on and prior to October 30, 1995, the claimant retained the stamina for a grossly normal lifestyle. Her grip strength was considered good, her visual fields were normal, and her gait was stable. The undersigned finds the claimant's testimony in light of all other evidence, including the medical exhibits is not sufficiently credible to support a finding of disability under the current criteria.

Initially, ALJ Russell does exactly what Luna and its progeny caution against. The ALJ generalizes his findings with regard to Plaintiff's credibility and references "the entire record" as support for his conclusions. The ALJ may have sufficient reasons to doubt Plaintiff's credibility. However, the ALJ's opinion does not contain the reasons. The ALJ briefly mentions the medical evidence and Plaintiff's daily activities. These brief mentions are simply insufficient. Basically, having referred to both Luna and Kepler in his decision [r. at 274], the ALJ then ignores both Tenth Circuit cases and simply disregards this Court's prior Order.

The medical evidence is clear. Plaintiff has been diagnosed with a diabetes-induced neuropathy[5/] in her lower legs and feet. Numerous notes from Plaintiff's physicians indicate that despite prescriptions of various pain medications, Plaintiff states that she has not experienced pain relief. Because Plaintiff has a medical condition which could be expected to produce pain, the ALJ is required, under Luna and Kepler to analyze Plaintiff's complaints of pain in his decision. The case law even provides some guidance to the ALJ in making this analysis. In assessing a claimant's credibility the ALJ may consider, but is certainly not limited to considering the following:

> [T]he levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are

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5/ The original diagnosis was "peripheral neuropathy." Plaintiff was, however, referred to the Mayo Clinic in Scottsdale, Arizona for a complete evaluation. The doctors there found no evidence of "peripheral neuropathy," but did find the early stages of "autonomic neuropathy." *R. at 149-52, 166-76, 197, 210 & 223-25.* It is clear, therefore, that Plaintiff is suffering from some type of diabetes-induced neuropathy.

> peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991). See also Luna, 834 F.2d at 165 ("For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication.").

In the prior remand Order, this Court directed the Commissioner to analyze Plaintiff's subjective complaints given the guidance by the Tenth Circuit Court of Appeals in Kepler. The ALJ's decision, however, provides no analysis with regard to Plaintiff's subjective complaints. The ALJ merely discounts the complaints based primarily on the medical record after having already found that a nexus exists. This action was previously remanded to permit the Commissioner a second chance to analyze Plaintiff's subjective complaints. On remand, ALJ Russell provided even less analysis than ALJ Michael in analyzing Plaintiff's credibility. The Commissioner is not entitled to unlimited "bites at the apple." In addition, the Court sees little point in remanding the same case, for a second time, to again request the Commissioner to do what the Court previously directed that the Commissioner do. Consequently, the Court concludes that this action should be remanded for an immediate award of

benefits. See, e.g., Dixon v. Heckler, 811 F.2d 506 (10th Cir. 1987); Dollar v. Bowen, 821 F.2d 530 (10th Cir. 1987).

V. CONCLUSION

Accordingly, the Commissioner's denial decision is **REVERSED** and the cause **REMANDED** for an immediate award of benefits.

Dated this 12th day of April 2000.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RAILROAD SIGNAL, INC., an Oklahoma corporation,	)	
Plaintiff,	)	
vs.	)	Case No. 99-CV-0294B(E)
BORDER PACIFIC RAILROAD, a Texas corporation,	)	
Defendant.	)	

STIPULATION OF DISMISSAL

Plaintiff, Railroad Signal, Inc., and Defendant, Border Pacific Railroad, pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, stipulate to the Dismissal of this litigation with prejudice to refiling. Each party shall bear their own costs and attorney's fees.

Dated this 12th day of April, 2000.

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FRANCIS J. SCHMIDT,	)	
SSN: 448-36-8223,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 93-CV-1088-EA**
	)	
KENNETH S. APFEL, Commissioner,	)	
Social Security Administration,[1]	)	
	)	
Defendant.	)	

ORDER

Claimant, Francis J. Schmidt, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration ("Commissioner") denying claimant's application for disability benefits under the Social Security Act. In accordance with 28 U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Tenth Circuit Court of Appeals. Claimant appeals the decision of the Administrative Law Judge ("ALJ") and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

Social Security Law and Standard of Review

Disability under the Social Security Act is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment

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[1] When claimant originally filed his Complaint, he named Donna Shalala, Secretary of Health and Human Services, as the defendant. Effective March 31, 1995, the Commissioner of Social Security became the appropriate party-defendant for purposes of judicial review under 42 U.S.C. § 405(g). When claimant reopened this case in 1998, Kenneth S. Apfel was Commissioner of Social Security and appropriately substituted as the defendant pursuant to Fed. R. Civ. P. 25(d)(1). No further action need be taken to continue this suit by reason of the last sentence of 42 U.S.C. § 405(g).

. . . ." 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his "physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy . . . ." Id. § 423(d)(2)(A). Social Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. §§ 404.1520, 416.920.[2]

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). This Court's review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted). The term substantial evidence has been interpreted by the U.S. Supreme Court to require "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The Court may not reweigh the evidence nor substitute its discretion for that

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[2] Step one requires claimant to establish that he is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510, 416.910. Step two requires that claimant establish that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See id. §§ 404.1521, 416.921. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with certain impairments listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1. A claimant suffering from a listed impairment or impairments "medically equivalent" to a listed impairment is determined to be disabled without further inquiry. If not, the evaluation proceeds to step four, where claimant must establish that he does not retain the residual functional capacity (RFC) to perform his past relevant work. If claimant's step four burden is met, the burden shifts to the Commissioner to establish at step five that work exists in significant numbers in the national economy which claimant--taking into account his age, education, work experience, and RFC--can perform. Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work. See generally Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

of the agency. Casias v. Secretary of Health & Human Servs., 933 F.2d 799, 800 (10th Cir. 1991). Nevertheless, the court must review the record as a whole, and "the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); see also Casias, 933 F.2d at 800-01.

Claimant's Background

Claimant was born on December 31, 1939, and was 56 years old at the time of the ALJ's decision. He was 44 years old when his insured status expired. He has a high school education, and worked as a truck driver and machinist. Claimant alleges an inability to work beginning December 15, 1981, after he sustained a closed head injury in a motorcycle accident on December 2, 1981. He claims to suffer brain damage as a result of that injury and prior skull fractures. He alleges that the trauma to his head adversely affected his attention span, memory, topographical orientation, judgment, reasoning, planning, sequencing, intellect, relationships, psychomotor skills, balance, and speech. He also claims that the trauma caused seizures, weakness, and fatigue, among other things.

Procedural History

Claimant has filed five applications for Social Security disability benefits under Title II (42 U.S.C. § 401 et seq.) He filed the first application on May 10, 1982. It was denied on July 20, 1982, and claimant filed no request for reconsideration. He filed later applications on February 28, 1983, August 30, 1984, and May 12, 1988, all of which were denied, and claimant did not pursue them further. He filed his current application on October 7, 1991, but it was dismissed by ALJ Stephen C. Calvarese on April 8, 1993, pursuant to the doctrine of *res judicata*. Claimant's request for review was denied by the Appeals Council, and claimant filed suit in this Court on December 7,

1993. However, the Commissioner moved to remand, and, on March 22, 1994, the Court granted the Commissioner's motion.

On remand the Commissioner reopened the claimant's May 10, 1982 application. Claimant was last insured for Social Security disability benefits on June 30, 1984. A supplemental hearing was held before ALJ Calvarese on August 30, 1996, in Tulsa, Oklahoma. By decision dated November 26, 1996, the ALJ found that claimant was not disabled on or before June 30, 1984. On January 15, 1998, the Appeals Council declined to assume jurisdiction. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. § 404.984(b)(2).

Decision of the Administrative Law Judge

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had organic brain syndrome, an impairment that was severe but did not meet or equal the criteria of any impairment listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1. He also found that claimant had the residual functional capacity (RFC) to understand and carry out simple job instructions, sustain work performance, cope with work pressures, and get along with co-workers and supervisors. Claimant had no exertional limitations. The ALJ determined that claimant could not perform his past relevant work, but, based on claimant's RFC, age, education, and work experience at the time his insured status ended, he was able to make a successful vocational adjustment to other jobs which existed in significant numbers in the national economy. The ALJ concluded that claimant was not under a disability, as that term is defined in the Social Security Act and regulations, on or before June 30, 1984, the date claimant's insured status expired.

Review

Claimant asserts the following as error: (1) the ALJ failed to accord appropriate weight to the treating source opinion; and (2) the ALJ's findings regarding claimant's mental RFC prior to the expiration of his insured status are not supported by substantial evidence. As the Commissioner points out, claimant argues that (1) the ALJ should have found claimant disabled based on the opinion of Varsha Sikka, M.D., and (2) the ALJ should have obtained medical expert assistance to infer claimant's disability onset date.

Medical Background

After claimant sustained his closed head injury on December 1, 1981, he was in the hospital until February 3, 1982. (R. 244) In the discharge report, Dr. Sikka reported CT scan findings compatible with an old depressed skull fracture with ventricular dilatation and atrophy of the left frontal lobe and some secondary cyst formation was suspected. She also indicated that claimant's right side mandible was fractured. (R. 245) In a letter dated March 2, 1982, to claimant's employer, Dr. Sikka listed numerous "deficits" she attributed to claimant, including the following: difficulty in following complex commands due to short attention span and distractibility; poor recent memory; reduced bilateral shoulder range movement; below normal gross and fine motor strength; poor topographical orientation (getting lost); unrealistic goal setting (impaired judgment and reasoning); poor sequencing; slightly impaired standing and walking balance; and lack of initiative and drive. (R. 323)

However, Dr. Sikka noted that this data was based on "pre-discharge testing" and could not be considered current because of the time that had elapsed since claimant's discharge. She also indicated that claimant had seven prior head injuries and it was impossible to state whether the

deficits listed were caused by the December 1981 head injury. (Id.) Dr. Sikka deemed the following areas within functional limits on that date: math skills adequate for checkbook balancing; good visual memory; intact perceptual skills; good non-verbal conceptualization; good visual analysis and synthesis in relation to perceptual motor organization; good visual concentration; independence in self-care; and ability to follow repetitive instructions. (Id.)

On March 26, 1982, Paul C. Williams, M.D., noted that claimant had made a slow recovery and was not sufficiently coordinated to return to his work as a machinist. Dr. Williams, a neurological surgeon, reported his findings on examination of claimant and concluded that claimant was "showing signs of recovery, but probably needs to be in a rehabilitative program so that he can return to gainful employment." (R. 255) On March 30, 1982, Dr. Williams reported CT scan findings showing that claimant had brain damage in the frontal area with a possible skull fracture and possible bone fragment within the cerebral tissue. (R. 254) Dr. Williams stated that claimant would be left with some type of deficit, but the extent of his deficit could not be determined until about a year after the injury. (Id.)

Claimant appeared for a consultative examination by a psychologist, Warren L. Smith, Ph.D., on June 8, 1982. Dr. Smith's evaluation showed that claimant was functioning in the dull-normal range of intelligence. Claimant had a verbal IQ score of 77, a performance IQ of 84, and a full scale IQ of 80. (R. 260) He reported his daily activities as including work around his house, repairing motorcycles, going to a café to eat breakfast and drink coffee, and visiting with a friend. (R. 258) After a thorough examination, Dr. Smith diagnosed claimant as having mild to moderate dementia. He noted that claimant showed a decrement in verbal intelligence, recent memory, psychomotor

slowing, and planning and sequencing abilities, but claimant did not show any particular psychological problems. Claimant had "little difficulty" in

> [r]estriction of daily activities, constriction of interests, deterioration of personal habits, impaired motivation or excessive dependency upon others. He does not need to rely on them for guidance and direction in life. He doesn't have a disturbed affect, there is not an impaired ability to carry on a rational conversation. There is no disturbance of thought, confusion, or difficulty with reality testing. He can read, write and carry on simple calculations. He would have little difficulty in relating to others, could cope with some work pressures and co-workers and would probably conform to the supervision of others. His major difficulty appears to be a mild to moderate deterioration of intelligence and memory which would prevent him from currently holding the job he did prior to his dementia.

(R. 260)

Dr. Sikka saw claimant in October 1982. Although Dr. Sikka's handwritten treatment notes are difficult to read and incomplete, it appears that claimant reported continued problems with his memory and speech. Dr. Sikka also noted that his cognitive abilities were impaired. (R. 272).

On April 3, 1983, claimant went to an emergency room after experiencing a seizure. (R. 263) He was treated, released, and subsequently seen by a neurologist, James C. Walker, M.D., for treatment of his seizure activity. Claimant reported that he had experienced four or five seizures since November 1982. (R. 275) Dilantin brought his seizures under "fairly good control." (R. 274) Dr. Walker reported that claimant's EEG results were considered normal, and his neurological examination was "within normal limits except for a very slight decrease in alternate motion rate of the right upper [extremity] and to a lesser extent the right lower [extremity], which could be slight residual of damage to the left cerebral hemisphere." (R. 274)

On April 26, 1983, claimant appeared for a consultative psychiatric examination by Joe Fermo, M.D. (R. 266-67) Dr. Fermo noted that claimant had recently married (December 1982).

Claimant told Dr. Fermo that he did some carpentry work at home, occasionally drove, amused himself by watching TV and playing Atari games, and went to church diligently once a week. (R. 266). Dr. Fermo reported:

> When seen, this White male who appears his stated age is neat and clean in appearance. Rapport was easily established. He is correctly oriented to time, place, and person. Memory for remote and recent events is not very good; he claims that he has problems concentrating, [grossly] diffuse, not markedly impaired. His affect is appropriate. He does not appear to be very [depressed] although he wishes that he could do the job that he used to do. He appears to function at an average intellectual level that is already depreciated on account of the injury that he had.

(Id.) He diagnosed claimant as having organic brain syndrome associated with head trauma, mild to moderate, and seizure disorder. He felt that claimant was "very unlikely" to be able to function at his previous level of intelligence. (Id.)

On June 13, 1983, claimant went to Dr. Sikka for a "recheck," according to the cryptic notes made by Dr. Sikka. (R. 271) Dr. Sikka noted that claimant still had dysrythia and poor memory, especially short-term memory. Dr. Sikka's notes appear to indicate "no change" in claimant's neurological condition. (Id.) On March 1, 1984, Dr. Sikka wrote to a claim examiner for an insurance company. (R. 325) There is no indication that Dr. Sikka had examined claimant since the prior June 13, 1983 examination. Nonetheless, she wrote that claimant "has cognitive and also memory problems. The patient has problems with recent memory and is not able to perform his regular occupation and regular duties. He can work in a sheltered workshop[3] where he can be observed and directed." (R. 325)

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[3] Sheltered employment is employment provided for handicapped individuals in a protected environment under an institutional program. SSR 83-33. It may or may not be considered "substantial gainful activity" depending on a claimant's earnings and activities. 20 C.F.R. §§ 404.1573(c), 404.1574(a)(3), 404.1574(b)(4). At any rate, the vocational expert testified that claimant could perform jobs other than those in sheltered workshops (R. 69-72), and the ALJ relied on this testimony (R. 27).

After claimant's insured status expired on June 30, 1984, claimant appeared for a consultative examination by Michael D. Farrar, D.O. The report indicates that claimant's "insurance was attempting to terminate him, so therefore he is applying for Social Security Disability." (R. 280) Claimant reported problems with his memory and weakness on his right side. Dr. Farrar reported that claimant "denied any seizure disorders, blackouts, or unconsciousness. He does not have any difficulty getting lost. He can follow directions fairly well. He does his minimal daily work at home and does not have difficulty dressing himself or providing care to him and his wife." (Id.) Dr. Farrar diagnosed claimant as having "status post head trauma with brain contusion" and "possible minimal brain dysfunction." (R. 281) Claimant's speech was sometimes slow and hesitant, but he answered all questions intelligently. (Id.)

On October 19, 1984, claimant saw Dr. Smith again. Claimant drove to the interview. Among other things, he told Dr. Smith that he had separated from his wife and he lived by himself in a trailer. (R. 283) He continued to claim that he had poor memory and weakness in his right side. He reported his daily activities as feeding his livestock, driving into town for a cup of coffee, cleaning his house, visiting with a friend, and watching television. He stated that he recently put in a septic tank. (Id.) Claimant achieved a verbal IQ score of 77, a performance IQ score of 80, and an full scale IQ score of 78. Dr. Smith indicated that these were in the borderline defective range of intellectual functioning. (R. 284) He noted that claimant did not appear particularly anxious or depressed and was "a rather pleasant and likeable individual." (Id.) Dr. Smith assessed claimant's highest level of adaptive functioning within the past year as "fair to good." (Id.) He summarized his findings in this manner:

> In summary, there is a minimum restriction of daily activity or constriction of interests. His personal habits are not of the best, but they don't seem to have deteriorated. He's fairly well-motivated. His motor function is somewhat disturbed, since he has a rather weak grip in his right hand. His affect appears to be within normal range. He does not appear exceptionally dependent upon others. He can guide and direct his own life, as well as dress and groom himself, avoid common dangers and deal with simple emergencies. There may be a mild decrement of intelligence or memory, but it's not shown on psychological testing. He can carry on a rational conversation. His thoughts are not disturbed or confused. Reality testing is intact. He can read, write, and calculate. He could understand simple job instructions and carry them out. He can sustain work performance. He could cope with work pressures and get along with co-workers and supervisors. He is sufficiently intact to handle his own finances.

(R. 285) The ALJ recited and relied upon these findings as well as those prior to June 30, 1994.

In 1985, claimant began seeing neurologist Michael J. Haugh, M.D., once or twice a year. Dr. Haugh consistently reported that claimant was totally disabled and not a candidate for rehabilitation. (See R. 297-98, 307-09, 326, 331-32.) Psychologist Terry G. Shaw, Ph.D., performed a consultative examination of claimant in 1991. (R. 288-93) He opined that claimant had "amnestic disorder" and deficits primarily related to the 1981 injury. (R. 293) He stated that claimant "would probably not be in a position to be gainfully employed in a competitive work environment." (Id.)

Finally, psychologist John W. Hickman, Ph.D., evaluated claimant after a consultative examination in 1996. (R. 380-83) Dr. Hickman diagnosed claimant as having a cerebral dysfunction, moderate to severe secondary to traumatic brain injury; borderline intellectual functioning; seizures, residual right hemiparesis; moderate degree of psychological stress secondary to unemployment, neuropsychological impairment, and social isolation; and Global Assessment of Functioning (GAF) - 55,[4] moderate to severe degree of overall impairment. (R. 381) Dr. Hickman

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[4] A score of 51-60 indicates moderate symptoms or moderate difficulty in social, occupational, or school functioning. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders § 245.2 (4th ed.1994).

reported that claimant's neuropsychological test scores "indicate he would not be able to obtain or maintain competitive employment. I think that even in a sheltered workshop setting, he would require constant cuing and redirecting because of his rapid rate of forgetting and his tendency to become somewhat tangential." (R. 380)

Treating Physician's Opinion

A treating physician may offer an opinion which reflects a judgment about the nature and severity of the claimant's impairments, including the claimant's symptoms, diagnosis and prognosis, what claimant can do despite the claimant's impairment, and any physical or mental restrictions. 20 C.F.R. § 404.1527(a)(2). The Commissioner will give controlling weight to that type of opinion if it is well-supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. Id. § 404.1527(d)(2). A treating physician may also proffer an opinion that a claimant is totally disabled. However, such an opinion is not dispositive because final responsibility for determining the ultimate issue of disability is reserved to the Commissioner. Id. § 404.1527(e)(2).

Tenth Circuit law requires that substantial weight must be given to the opinion of a treating physician unless good cause is shown for rejecting it. Goatcher v. United States Dep't. of Health & Human Servs., 52 F.3d 288, 289-90 (10th Cir. 1995) (citations omitted). A treating physician's report may be rejected if it is brief, conclusory, and unsupported by medical evidence. Bernal v. Bowen, 851 F.2d 297 (10th Cir. 1988); see also Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1029 (10th Cir. 1994). If the treating physician's opinion is to be disregarded, specific, legitimate reasons for doing so must be set forth. Eggleston v. Bowen, 851 F.2d 1244, 1246-47 (10th Cir. 1988).

The ALJ chose to disregard Dr. Sikka's reports, to the extent they were inconsistent with the RFC as determined by the ALJ, because "Dr. Sikka is not a mental health specialist; Dr. Sikka's opinion is inconsistent with other medical evidence, including other physician opinions; and Dr. Sikka presents no clinical evidence, objective findings, or relevant test results to support his [sic] opinion." (R. 23) The Court finds that these are specific, legitimate reasons. In particular, Dr. Sikka's specialty is family practice and pulmonary medicine. (R. 273) Dr. Williams is a neurological surgeon; Dr. Smith is a psychologist; Dr. Fermo is a psychiatrist; and Dr. Walker is a neurologist. Whether or not the physician is a specialist in the area upon which an opinion is rendered is an appropriate factor for the ALJ to consider. Goatcher v. United States Dep't. of Health and Human Servs., 52 F.3d 288, 290 (10th Cir. 1995); 20 C.F.R. § 404.1527(d)(5).

The other reasons cited by the ALJ are valid pursuant to 20 C.F.R. § 404.1527 and the relevant case law discussed above. The reports of Drs. Williams, Smith and Fermo do not indicate, as claimant argues, that claimant was unable to perform work at some level below his past relevant work. Drs. Haugh, Shaw, and Hickman, who treated or examined claimant after 1984, opined that claimant was totally disabled, but their opinions were written in 1985, 1991 and 1996 -- after the date claimant's insured status expired.

Although Dr. Sikka's opinions are consistent with the opinions of physicians who saw claimant after 1984, they are not consistent with those who saw him before the date claimant's insured status expired. Claimant's mental status may have deteriorated to the point of disability after June 30, 1984, but the ALJ relied on substantial evidence to determine that claimant was not disabled before that date. Having rejected the opinions of Dr. Sikka, the ALJ properly relied on the contemporaneous reports of claimant's neurological surgeon and two consultative psychological

examiners which indicate that, although claimant had diminished mental capabilities and could not perform his past relevant work, there were other jobs existing in significant numbers in the national economy that claimant could perform.

Substantial Evidence for Claimant's Mental RFC

The Tenth Circuit requires an ALJ to follow the procedure in 20 C.F.R. § 404.1520a when he evaluates mental impairments that allegedly prevent a claimant from working. See Winfrey v. Chater, 92 F.3d 1017, 1024 (10th Cir. 1996); Cruse v. United States Dep't of Health & Human Servs., 49 F.3d 614, 617 (10th Cir. 1994). The procedure first requires the ALJ to determine the presence or absence of certain medical findings pertaining to claimant's ability to work. Next, the ALJ is to evaluate the degree of functional loss resulting from claimant's impairment. The ALJ must then complete a Psychiatric Review Technique ("PRT") form and attach it to a written decision in which he or she discusses the evidence upon which the conclusions expressed on the form are based. Winfrey, 92 F.3d at 1024; Cruse, 49 F.3d at 617-18; see also Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994). The ALJ followed this procedure.

Claimant also argues that the ALJ should have ordered a medical expert to testify as to the proper onset date. This argument appears to be based on erroneous assumptions. The alleged date of onset was the date of claimant's motorcycle accident in 1981. The ALJ properly evaluated whether claimant was disabled between that date and the date claimant's insured status expired. He was not required to determine whether claimant became disabled after that date. Further, the ALJ did not base his RFC finding on his own opinion or an isolated record. As set forth above, he recited the opinions of all the treating physicians who saw claimant and reported their opinions during the relevant time period. He discussed the inconsistencies between Dr. Sikka's opinion and those of the

other physicians. The fact that he did not resolve those inconsistencies in claimant's favor does not mean that he resolved them improperly.

Further, the Commissioner obtained the services of numerous medical consultants to examine claimant. The ALJ fulfilled his duty to fully develop the record. See Baca v. Department of Health & Human Servs., 5 F.3d 476, 479-80 (10th Cir. 1993). Another consultative examination or medical opinion was not necessary. The Commissioner can use medical sources to provide evidence, including opinion, on the nature and severity of a claimant's impairment(s); however, the final responsibility for determining the ultimate issue of disability is reserved to the Commissioner. 20 C.F.R. § 404.1527(e)(2).

Conclusion

The decision of the Commissioner is supported by substantial evidence and the correct legal standards were applied. The decision is **AFFIRMED**.

DATED this 11th day of April, 2000.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FRANCIS J. SCHMIDT, **SSN: 448-36-8223,**	)	
Plaintiff,	)	
v.	)	**Case No. 93-CV-1088-EA**
KENNETH S. APFEL, Commissioner, **Social Security Administration,**	)	
Defendant.	)	

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Commissioner's denial of benefits to plaintiff has been entered. Judgment for the defendant and against the plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 11th day of April, 2000.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN WINTON and EVELYN WINTON,

Plaintiffs,

v.

BOARD OF COUNTY COMMISSIONERS OF TULSA COUNTY, OKLAHOMA; STANLEY GLANZ, individually and in his official capacity as Tulsa County Sheriff; JACK PUTMAN; and WEXFORD HEALTH SOURCES INC., a Florida Corporation,

Defendants.

Case No. 97-CV-841-J

JUDGMENT BY AGREEMENT

This action comes on for hearing on this 12 day of April, 2000, the Plaintiffs, John Winton and Evelyn Winton (the "Wintons"), appearing by and through their legal counsel, D. Gregory Bledsoe and Steven Novick, and Defendants, Board of County Commissioners of Tulsa County, Oklahoma ("the Board") and Stanley Glanz, Tulsa County Sheriff ("Sheriff Glanz"), appearing by and through their legal counsel, C.S. Lewis, III and Reuben Davis, respectively.

The Court finds that on March 20, 2000, the Board, by motion during a regularly scheduled meeting, unanimously agreed to enter into a settlement agreement with the Wintons, without admitting any liability as to the Board, Tulsa County, Sheriff Glanz and all of their respective employees in both their individual and official capacities, for the total sum of $75,000 (seventy-five thousand dollars) which is inclusive of all damages, costs, litigation expenses, prejudgment interest and attorneys' fees.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiffs, John Winton and Evelyn Winton, jointly have and recover judgment by agreement of and from Defendants, the Board and Stanley Glanz in his official capacity as Tulsa County Sheriff, as full and final

settlement of all claims for the total sum of $75,000, inclusive of all damages, costs, litigation expenses, prejudgment interest and attorneys' fees, together with interest from the date of this Judgment at a rate not to exceed ten percent (10%) as provided by law, which is 8.73% for the calendar year 2000.

Sam A. Joyner
U.S. MAGISTRATE JUDGE

APPROVED AS TO FORM:

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Attorneys for Defendant, Sheriff Stanley Glanz

FILED

APR 12 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

WENDY L. MOFFAT-DEMEREE,

Plaintiff,

vs.

TULSA COUNTY BOARD OF COUNTY COMMISSIONERS,

Defendant.

Case No. 99-C-006-B

ENTERED ON DOCKET

DATE APR 13 2000

JOURNAL ENTRY ON CONFESSION OF JUDGMENT

This cause comes on for hearing on this 12th day of April, 2000. The Plaintiff, Wendy L. Moffat-Demeree, appearing by Counsel, D. Gregory Bledsoe and ~~Steven~~ Clay A. Roberts Novick. Defendant, Board of County Commissioners of Tulsa County, Oklahoma, appearing by Fred J. Morgan, Assistant District Attorney. The Court finds that these parties have entered the following stipulations:

1. On April 3, 2000, the Board of County Commissioners of Tulsa County, Oklahoma approved the recommendation of the District Attorney of Tulsa County, Oklahoma, to confess judgment in the case herein in the amount of Ten Thousand Dollars ($10,000.00) under the following conditions:

a. The Defendant, Board of County Commissioners, is in no way admitting any liability or fault on the part of Sheriff Stanley Glanz, or any other unnamed employees and/or agents of the Tulsa County Sheriff or Tulsa County, Oklahoma;

b. That the settlement of this case will result in a full release of any and all, past, present, or future claims against Defendant Board of County Commissioners of the County of Tulsa and any other unnamed employees and/or agents of the Tulsa County Sheriff or

Tulsa County, Oklahoma, which Plaintiff Wendy L. Moffat-Demerree has or may have as a result of the incidents alleged to have occurred herein;

c. That the settlement of this case will result in a full release of any and all, past, present, or future claims for attorney's fees under 42 U.S.C. § 1988, and costs associated therewith against Defendant Board of County Commissioners of the County of Tulsa, as well as against any unnamed employees and/or agents of the Tulsa County Sheriff or Tulsa County, Oklahoma, which Plaintiff Wendy L. Moffat-Demeree or her attorneys, D. Gregory Bledsoe and Steven A. Novick, may have as a result of this judgment.

2. Plaintiff is fully aware of the conditions upon which this confession of judgment is made and hereby fully accepts said conditions.

The Court accepts these stipulations and based upon said stipulations finds that the Plaintiff is entitled to recover the sum of Ten Thousand Dollars ($10,000.00) against the Board of County Commissioners of the County of Tulsa, Oklahoma.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff recover judgment against the Board of County Commissioners of Tulsa County, Oklahoma, in the sum of Ten Thousand Dollars ($10,000.00), with interest from the date hereof as provided by law.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

JUDGMENT IN CASE NO. 99-CV-006-E APPROVED AS TO FORM AND CONTENT:

WENDY L. MOFFAT-DEMEREE
Plaintiff

D. GREGORY BLEDSOE
Attorney for Plaintiff

CLAY ROBERTS
Attorney for Plaintiff

BOARD OF COUNTY COMMISSIONERS
OF TULSA COUNTY, OKLAHOMA

By:
FRED J. MORGAN
ASSISTANT DISTRICT ATTORNEY
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALEXANDER GAUT,

Plaintiff,

vs.

CITY OF TULSA, OKLAHOMA, a municipal corporation; SGT. C. W. JORDAN, an individual; SGT. MIDDLETON, an individual; CAPT. K. L. ROVAN, an individual; OFF. D. PIERCE, an individual; OFF. K-9 DINO, an individual; and K-9 TRAINER (John Doe), an individual;

Defendants.

Case No. 98-CV-720-BU (E)

ORDER

In this prisoner civil rights action Plaintiff, a state inmate appearing *pro se*, sues the City of Tulsa, a municipal corporation of Oklahoma; Sgt. C. W. Jordan, an individual; Sgt. Middleton, an individual; Capt. K. L. Rovan, an individual; Officer D. Pierce, an individual; Officer K-9 Dino, an individual; and K-9 Trainer (John Doe), an individual, alleging that Defendants used excessive force during his arrest on February 28, 1998. By previous Order (Docket #7), Defendant Officer K-9 Dino was dismissed from this action. Defendants Rovan and Jordan have moved to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted (Docket #s 12 and 13).[1] In the alternative, Defendants Rovan and Jordan assert they are entitled to qualified immunity.

[1]The Court notes that Defendant Middleton joined Defendants Rovan and Jordan in filing a reply to Plaintiff's responses to the motions to dismiss. However, Defendant Middleton had not previously appeared in this matter and was not named as a movant in either of the motions to dismiss. The Court cannot consider granting the relief requested in the motions to dismiss to Defendant Middleton unless he files a separate motion. Joining in a reply does not entitle a defendant to relief previously requested by other defendants. The Court also notes that prior to receiving the reply, Plaintiff had no notice of Defendant Middleton's participation in the motions to dismiss.

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Plaintiff has objected (#s 17 and 18). For the reasons stated below, the Court concludes that the motions to dismiss by Defendants Rovan and Jordan should be granted. As a result, their alternative motions for qualified immunity have been rendered moot.

BACKGROUND

On August 21, 1998, Plaintiff filed this civil rights action in the District Court of Tulsa County alleging excessive use of force by Tulsa Police Officers during his arrest. Defendant City of Tulsa removed the action to this Court. The record before the Court indicates that on February 28, 1998, Plaintiff was the driver of an automobile involved in a traffic accident resulting in a fatality. Plaintiff, who admits he had been drinking prior to the accident, fled the scene and attempted to hide in the bed of a pickup truck parked about a block away. Defendant Officer Pierce and his police dog, K-9 Officer Dino, discovered Plaintiff hiding in the pickup truck. In his complaint, Plaintiff alleges that Defendant Officer Pierce ordered K-9 Officer Dino to attack. Plaintiff states he "made no attempt to resist or escape the officers scope." During his apprehension, Plaintiff sustained a dog bite to his left calf and to his hand.

Plaintiff further claims that Defendants Capt. Rovan and Sgt. Middleton "gave assignments" to other police officers at the scene of the automobile accident. According to Plaintiff, Defendant Rovan "acted with negligence and deliberate indiffernce (sic) . . . by not placeing (sic) personnel qualified to exercise departmental procedure and policy in capture and apprehendtion (sic) of a supect (sic) or arrestee . . . and that Capt. K. L. Rovan acted with negligence by placing Sgt. Jordan in charge of apprehention (sic) or capture of the suspect." Plaintiff further claims that Defendant "Middleton was negligence (sic) in placeing (sic) Sgt. Jordan in charge of search or capture." In addition to alleging civil rights violations, Plaintiff claims "assault, battery and intentional infliction of emotional distress" and seeks compensatory and punitive damages, and declaratory relief. (#1.)

DISCUSSION

A. Standard of Review

The purpose of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the case. A defendant must meet a high standard to have a complaint dismissed for failure to state a claim upon which relief may be granted. In fact, in ruling on a motion to dismiss, the Court must construe the complaint's allegations in the light most favorable to the plaintiff and take as true all well-pleaded facts and allegations in the plaintiff's complaint. Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991); Meade v. Grubbs, 841 F.2d at 1512. The allegations of a complaint should be construed liberally and a complaint should not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Meade, 841 F.2d at 1512 (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)).

When reviewing a pro se complaint, as in this case, the Court must employ standards less stringent than if the complaint had been drafted by counsel. Haines v. Kerner, 404 U.S. 519, 520-21 (1972). However, in order to withstand a motion to dismiss, a complaint must allege facts sufficiently setting forth the essential elements of the cause of action. Gray v. County of Dane, 854 F.2d 179, 182 (7th Cir.1988).

In the context of civil rights claims against government officials, it is well established that a defendant may not be held individually liable under section 1983 unless the defendant caused or participated in the alleged constitutional deprivation. Housley v. Dodson, 41 F.3d 597, 600 (10th Cir. 1994). Mere supervisory status, without more, will not create liability in a Section 1983 action. Ruark v. Solano, 928 F.2d 947, 950 (10th Cir. 1991). The Tenth Circuit standard for supervisory

liability under § 1983 is stated in Woodward v. City of Worland, 977 F.2d 1392 (10th Cir.1992). Johnson v. Martin, 195 F.3d 1208, 1219 (10th Cir. 1999). According to Woodward, supervisor liability requires 'allegations of personal direction or of actual knowledge and acquiescence.' " Woodward, 977 F.2d at 1400 (quoting Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3d Cir.1990)). Under this standard, mere negligence is insufficient to establish supervisory liability. Id. at 1399. To state a claim against a supervisor, a plaintiff must allege facts which demonstrate the supervisor's personal involvement in the unconstitutional activities of his subordinates; at a minimum, the plaintiff must allege knowledge or "deliberate indifference" to the subordinates' actions. Volk v. Coler, 845 F.2d 1422, 1431 (7th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512, 1527-28 (10th Cir. 1988). In the present case, Defendants Rovan and Jordan will be held individually liable only if, by their own conduct, they deprived the Plaintiff of any rights secured under the Constitution. See Rizzo v. Goode, 423 U.S. 362, 377 (1976); Duckworth v. Franzen, 780 F.2d 645, 650 (7th Cir.1985), cert. denied, 479 U.S. 816 (1986).

B. Plaintiff has failed to state a claim against Defendants Rovan and Jordan

Plaintiff's claims against Defendants Rovan and Jordan are based on these Defendants' roles as supervisors. After liberally construing Plaintiff's complaint, the Court finds that the Plaintiff has failed to assert an affirmative link to establish that Defendants Rovan and Jordan, by their own conduct, caused or participated in any alleged constitutional violations. Furthermore, to the extent Plaintiff alleges these Defendants acted negligently, his claims are insufficient under § 1983 which requires more than simple negligence. Woodward 977 F.2d at 1399.

Plaintiff does allege that Defendant Rovan acted with deliberate indifference in making her assignments at the scene of the accident. However, Plaintiff's allegations are far too vague and

speculative to hold Defendant Rovan individually liable for alleged constitutional deprivations. Plaintiff fails to allege any fact that would support a conclusion that Defendants Rovan and Jordan were on notice that Officers Pierce and Dino, or any other police officers, were not qualified to capture and apprehend a suspect who had fled the scene of an accident. Nor does he allege evidence of prior problems with these particular officers. Cf., McClelland v. Factear, 610 F.2d 693, 697 (10th Cir. 1979). Plaintiff has not alleged any fact supporting his belief that the deprivation occurred at the direction or with the knowledge and consent of these Defendants. See Volk, 845 F.2d at 1432 (quoting Crowder v. Lash, 687 F.2d 996, 1005 (7th Cir.1983)). Plaintiff has not alleged an "affirmative link" between the incident of alleged police misconduct and these Defendants' deliberate indifference to the need to prevent that misconduct.

Furthermore, to the extent Plaintiff argues these Defendants failed to "instruct, supervise, control and discipline on a continuing basis," see #s 17 and 18, Plaintiff has failed to allege specific facts to identify a deficiency in the training program for Tulsa Police Officers that actually caused the ultimate injury. See Canton v. Harris, 489 U.S. 378, 391 (1989). The Court finds Plaintiff has not alleged sufficient facts that would support a conclusion that these Defendants, in their individual capacity, are liable for a failure to train or supervise that amounts to deliberate indifference to the rights of Tulsa residents to be free from excessive force. Even construing the Plaintiff's complaint liberally, in accordance with his *pro se* status, the Court finds that the Plaintiff has failed to adequately set forth the requisite nexus to establish the individual liability of Defendants Rovan and Jordan. Accordingly, Plaintiff's claims against Defendants Rovan and Jordan in their individual capacity must be dismissed.

CONCLUSION

After liberally construing Plaintiff's complaint, the Court concludes that the motions to dismiss for failure to state a claim filed by Defendants Rovan and Jordan should be granted. Defendants' alternative motions for qualified immunity are moot.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) **Defendants' motions to dismiss (#s 12-1 and 13-1) are granted.**

(2) **Plaintiff's claims against Defendants Rovan and Jordan are dismissed with prejudice.**

(3) **Defendants' "motions for qualified immunity" (#s 12-2 and 13-2) are moot.**

SO ORDERED THIS 12 day of April, 2000.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEBRA R. TERRY,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS OF OTTAWA COUNTY and **BEVERLY STEPP,** in her official capacity as Court Clerk of Ottawa County,

Defendants.

No. 99-CV-125-E

AMENDED DEFAULT JUDGMENT

Default Judgment was entered for the plaintiff on October 19, 1999 with post-judgment interest at the rate of 5.411%. Thereafter, plaintiff sought an order directing payment of the judgment immediately. An order was entered on March 17, 2000 by the Magistrate Judge directing that the judgment be paid pursuant to the provisions of 62 O.S. §365.5 at the prevailing state post-judgment interest rate under 12 O.S. §727. No objection having been made to the March 17, 2000 order of the Magistrate Judge, it is hereby confirmed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court, in accordance with its August 3, 1999, October 12, 1999, and March 17, 2000 orders, that plaintiff Debra R. Terry be awarded default judgment against the defendants Board of County Commissioners of Ottawa County and Beverly Stepp in her official capacity as Court Clerk of Ottawa County in the amount of $28,711.00, with post-judgment interest thereon to be paid from and after October 19, 1999 at the prevailing state post-judgment interest rate as provided in 12 O.S. §727, which is 8.87% for 1999 and 8.73% for 2000.

ORDERED this 12th day of April, 2000.

JAMES O. ELLISON
United States District Judge

31

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 12 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO. 00CV0179B(J)
	)	
PAT T. HOPE,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET
DATE APR 13 2000

AGREED JUDGMENT AND ORDER OF PAYMENT

Plaintiff, the United States of America, having filed its Complaint herein, and the defendant, having consented to the making and entry of this Judgment without trial, hereby agree as follows:

1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.

2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.

3. The defendant hereby agrees to the entry of Judgment in the principal sum of $7,551.94, plus accrued interest of $1,683.56, plus interest thereafter at the rate of 8.25% per annum until judgment, plus filing fees in the amount of $150.00, plus interest thereafter at the legal rate 6.197% until paid, plus costs of this action, until paid in full.

4. Plaintiff's consent to the entry of this Judgment and Order of Payment is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that he is unable to presently pay the amount of indebtedness in full and the further representation of the defendant that Pat T. Hope will well and truly honor and comply with the Order of

Payment entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

(a) Beginning on or before the 15th day of May, 2000, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of $200.00, and a like sum on or before the 15th day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

(b) The defendant shall mail each monthly installment payment to: United States Attorney, Financial Litigation Unit, 333 West 4th Street, Suite 3460, Tulsa, Oklahoma 74103-3809.

(c) Each said payment made by defendant shall be applied in accordance with the U.S. Rules, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided by 28 U.S.C. § 1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

(d) The defendant shall keep the United States currently informed in writing of any material change in her financial situation or ability to pay, and of any change in her employment, place of residence or telephone number. Defendant shall provide such information to the United States Attorney at the address set forth above.

(e) The defendant shall provide the United States with current, accurate evidence of her assets, income and expenditures (including, but not limited to her Federal income tax returns) within fifteen (15) days for the date of a request for such evidence by the United States Attorney.

5. Default under the terms of this Agreed Judgment will entitle the United States to execute on this Judgment without notice to the defendant.

6. The parties further agree that any Order of Payment which may be entered by the Court pursuant hereto may thereafter be modified and amended upon stipulation of the parties; or, should the parties fail to agree upon the terms of a new stipulated Order of Payment, the Court may, after examination of the defendant, enter a supplemental Order of Payment.

7. The defendant has the right of prepayment of this debt without penalty.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Pat T. Hope, in the principal amount of $7,551.94, plus accrued interest in the amount of $1,683.56, plus interest at the rate of 8.25 until judgment, plus filing fees in the amount of $150.00, plus interest thereafter at the current legal rate of 6.197% percent per annum until paid, plus the costs of this action.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Stephen C. Lewis
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney

PAT T. HOPE

PEP/llf

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

ANN PORTER, an individual and the wife of JOHN E. PORTER, and JOHN E. PORTER, an individual and the husband of ANN PORTER,

Plaintiffs,

vs.

CORRPRO COMPANIES INC., JOSEPH W. ROG, JAMES W. DELONG, and JOHN D. MORAN,

Defendants.

No. 99 CV 0924K (E)

ORDER APPROVING SETTLEMENT AND DISMISSING CASE WITH PREJUDICE TO FUTURE REFILING

NOW on this 11th day of April, 2000, this matter came on for consideration before the Court. Plaintiffs, Ann Porter and John E. Porter, appeared personally, and Jo Anne Deaton appeared on behalf of the Defendants. The Court, having heard testimony from the parties concerning their agreement to settle Plaintiffs' claims, finds that Plaintiffs have entered into the settlement agreement knowingly and voluntarily. The Court further finds that the Settlement Agreement should be approved, and that Plaintiffs' lawsuit against Defendants should be dismissed with prejudice to refiling in the future.

IT IS SO ORDERED this 11th day of April, 2000.

Frank H. McCarthy

FRANK H. McCARTHY
United States Magistrate Judge

Jo Anne Deaton
P.O. Box 21100
Tulsa, OK 74121
1224-17

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD K. LEE,

Plaintiffs,

v

IRA MONAS,

Defendant.

Case No. 99CV0391K (E)
Judge Terry C. Kern

ORDER OF DISMISSAL WITHOUT PREJUDICE

COMES ON for consideration the Motion of the Plaintiff, Lombard Odier & Cie, for Voluntary Dismissal Without Prejudice. Upon consideration of the pleadings and argument of counsel, the Court finds that said Motion should be granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the claims of the Plaintiff, Lombard Odier & Cie, asserted herein against the Defendant, Ira Monas, are hereby dismissed without prejudice to their refiling.

SIGNED this 10 day of April, 2000.

Terry C. Kern
UNITED STATES DISTRICT JUDGE

APPROVED:

Cleve Powell

Cleve W. Powell — OBA #11609
Attorney and Counselor at Law
1223 E. Highland Ave., Ste. 311
Ponca City, OK 74601-4653
(580) 761-3100
(580) 762-3169 [facsimile]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KATY D. CHAMPAGNE and ANDRE CHAMPAGNE, Plaintiffs, v. SECURITY LIFE INSURANCE COMPANY OF AMERICA; CORPORATE BENEFIT SERVICES OF AMERICA, INC.; and WISCONSIN PHYSICIANS SERVICE INSURANCE CORPORATION, Defendants.	)	ENTERED ON DOCKET DATE APR 12 2000 Case No. 98-CV-170-K (J) FILED APR 11 2000 Phil Lombardi, Clerk U.S. DISTRICT COURT

ORDER

Before the court are Defendants Wisconsin Physicians Service Insurance Corporation's ("WPS'") and Corporate Benefit Services of America, Inc.'s ("CBSA's") motions to dismiss. WPS asserts that Plaintiffs fail to state claims for breach of duty of good faith and fair dealing, intentional infliction of emotion distress, and fraud and misrepresentation. Like WPS, CBSA asks the Court to dismiss Plaintiffs' fraud claim under Fed. R. Civ. P. 12(b)(6), for failing to plead with particularity as required by Rule 9(b).

I. History of Case

Plaintiffs are suing Defendants WPS, CBSA, and Security Life Insurance Company of America, Inc. ("Security Life"), for the events surrounding Plaintiff Katy Champagne's development of breast cancer, the initial denial and late payment of her claims, the amount

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of those payments, and the subsequent rise in both Plaintiffs' insurance premiums. The motions to dismiss at issue were filed in response to Plaintiffs' Third Amended Complaint, filed on November 18, 1999. This complaint added WPS to the breach of good faith and fair dealing and intentional infliction of emotion distress claims and added an additional cause of action for fraud and misrepresentation against all three defendants. On December 7, 1999, CBSA filed a motion to dismiss the fraud claim, and on December 27, 1999, WPS filed a motion to dismiss all of Plaintiffs' claims against it.

II. Applicable Law

A court may dismiss a complaint for failure to state a claim only if it is clear that the plaintiff can prove no set of facts in support of his claim entitling him to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Calderon v. Kansas Dep't of Social & Rehabilitation Servs.*, 181 F.3d 1180, 1183 (10th Cir. 1999). For purposes of making this determination, a court must accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiff. *See Realmonte v. Reeves*, 169 F.3d 1280, 1283 (10th Cir. 1999). As granting a motion to dismiss is a harsh remedy, it must be cautiously studied, both to effectuate the spirit of the liberal rules of pleading and to protect the interests of justice. *See Cottrell, Inc. v. Biotrol Int'l, Inc.*, 191 F.3d 1248, 1251 (10th Cir. 1999).

III. Implied Covenant of Good Faith & Fair Dealing

Plaintiffs have stated a claim for breach of the implied covenant of good faith and fair dealing against WPS. In Oklahoma, an insurer has an implied duty to deal fairly and act in

good faith with its insured, and the violation of this duty is an actionable tort. *See Hall v. Goodwin*, 775 P.2d 291, 296 (Okla. 1989). In order for this duty to arise, there must be either a statutory or contractual relationship between the defendant and the party asserting the bad faith claim. *See Roach v. Atlas Life Ins. Co.*, 769 P.2d 158, 161 (Okla. 1989). There are exceptions to this rule, such as when the contracting insurer is merely an instrumentality of another corporation, *see Oliver v. Farmers Ins. Group of Cos.*, 941 P.2d 985, 987 (Okla. 1997), or when a party acts like an insurer such that there is a special relationship between it and the insured, *see Wolf v. Prudential Ins. Co.*, 50 F.3d 793, 797 (10th Cir. 1995). Plaintiffs argue that WPS both acted like an insurer and is a joint venturer with CBSA and Security Life, giving rise to a duty of good faith and fair dealing. Accepting the allegations in the complaint as true and construing them in a light most favorable to Plaintiffs, the Court finds that it is not clear that Plaintiffs could prove no set of facts in support of their claim. Plaintiffs have sufficiently alleged the existence of a joint venture between CBSA, WPS, and Security Life, stating a claim for breach of the implied covenant of good faith and fair dealing.

IV. Intentional Infliction of Emotional Distress

Plaintiffs have stated a claim against WPS for intentional infliction of emotional distress. Oklahoma recognizes an independent tort of outrage or intentional infliction of distress, which is governed by Restatement (Second) of Torts § 46. *See Gaylord Entertainment Co. v. Thompson*, 958 P.2d 128, 149 (Okla. 1998). Under section 46, the tort

for intentional infliction of emotional distress lies where the defendant, by extreme and outrageous conduct, intentionally or recklessly causes severe emotional distress. *See* Restatement (Second) of Torts § 46 (1965). Plaintiffs have alleged all the elements of this claim. Contrary to WPS' assertion, Plaintiffs are not required to show that WPS otherwise owed any duties to them, WPS' citation to *Boos v. Donnell* notwithstanding. 421 P.2d 644 (1966). *Boos* merely notes that the existence of a statutorily- or otherwise-imposed duty is necessary to create a tort claim. *See id.* at 646. As noted above, Oklahoma has recognized the independent tort for intentional infliction of emotional distress, imposing on all persons a duty to refrain from intentionally causing severe emotional distress through extreme and outrageous conduct. Plaintiffs need allege no more this in order to state a claim upon which relief could be granted.

V. Fraud

A. Standard

Rule 9(b) requires that, in all averments of fraud, "the circumstances constituting fraud . . . shall be stated with particularity." Fed. R. Civ. P. 9(b). The requirements of Rule 9(b) are read in conjunction with the principles of Rule 8, which calls for simple, concise, and direct pleadings construed so as to do substantial justice. *See Schwartz v. Celestial Seasonings, Inc.*, 124 F.3d 1246, 1252 (10th Cir. 1997). The purpose of Rule 9(b) is to afford the defendant fair notice of the plaintiff's claims and their factual grounds. *See Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1236 (10th Cir. 2000). Therefore, the complaint must

set forth the following: (1) the time, place, and contents of the false representation; (2) the identity of the party making the false statements; and (3) the consequences thereof. *See id.*

B. Time, Place, and Contents

In their response, Plaintiffs assert that their complaint alleges the following four misrepresentations: (1) that Security Life would act as their insurer; (2) that Plaintiffs' policy was a group policy; (3) that the policy paid only for usual and customary charges; and (4) the manner in which usual and customary charges would be calculated. Plaintiffs assert that the date of these misrepresentations was December 8, 1996, when the policy was issued to the Champagnes. Plaintiffs' complaint, however, alleges that Defendants never sent them a copy of the Master Policy, so Plaintiffs cannot be alleging that Defendants made misrepresentations to them in the Master Policy.

Plaintiffs have not made the first, second, and fourth of these allegations with any degree of particularity. Nowhere in the complaint do Plaintiffs set forth where Defendants stated that Security Life would act as their insurer. They merely assert that Defendants concealed the true nature of their relationship with each other and the fact that WPS rented Security Life's name and license in order to evade Oklahoma's licensing requirements. The complaint states that Defendants misrepresented that the policy was a group policy, without stating when or how this representation was made. Finally, the complaint never alleges that Defendants made any representations regarding how the calculation of usual and customary charges would be made. Rather, the complaint asserts that Defendants never revealed to

Plaintiffs that they would use a certain formula in making the calculation. Of the above-enumerated allegations, Plaintiffs have only alleged the third one in the complaint – that the Certificate of Insurance misrepresented that the policy allowed for deductions based on usual and customary charges. While there may be some question as to whether the complaint alleges that Plaintiffs received the Certificate on December 8, 1996, the Court finds that the inclusion of the Certificate's number provides Defendants with ample notice as to the date of the alleged misrepresentation. While Plaintiffs' response appears to limit their claims to the four enumerated above, the complaint could be read to contain several other generalized fraud allegations, all of which fail for a complete lack of specificity as to content and for the reasons set forth below. *Cf. Koch*, 203 F.3d at 1237 (finding allegations insufficient that, among other things, specified nothing about content but instead stated that the defendants failed to disclose the existence, location, ownership, condition and true value of the assets and property at issue).

C. Identity of Party

Plaintiffs' complaint fails sufficiently to identify the parties making the alleged misrepresentations.[1] Plaintiffs merely allege that "Defendants" made the misrepresentations or omissions. The Complaint fails to identify the specific role of the various Defendants in propounding the fraudulent statements. *Cf. Schwartz*, 124 F.3d at 1254 ("In order to

[1]This element is particularly important where, as here, there are multiple individual defendants. *See Koch*, 203 F.3d at 1237.

adequately allege underwriter responsibility for [the Company's] statements, the complaint must identify the specific role of the underwriters in propounding the fraudulent statements."). Plaintiffs allege that the Defendants entered into a deliberate plan of fraud and misrepresentation and were joint venturers liable for each other's conduct. This allegation, however, is insufficient to give notice to the individual defendants of the fraudulent statements for which they are alleged to be responsible. *See Schwartz*, 124 F.3d at 1253.[2]

D. Consequences

Plaintiffs utterly fail to allege the consequences of the misrepresentations. The complaint merely states that the fraud and misrepresentations caused Plaintiffs damages in excess of $10,000 in the form of economic loss and emotional distress. The complaint does not allege how the misrepresentations caused any damage to Plaintiffs. *Cf. Schwartz*, 124 F.3d at 1254-55 (finding allegation sufficient that alleged how the misrepresentations caused investors to entertain false beliefs about the defendant company, resulting in a temporary artificial inflation of the stock price).

VI. Conclusion

Plaintiffs have stated claims for breach of the implied covenant of good faith and fair dealing and intentional infliction of emotional distress against Defendant Wisconsin

[2]The Tenth Circuit has indicated that, where the fraud allegations arise from statements in certain group-published documents, such as a company's annual reports, the complaint need not allege which individual defendant within the group is responsible for the misrepresentation. *See Schwartz*, 124 F.3d at 1254. Even if this exception were otherwise applicable, Plaintiffs have not alleged in their complaint that Defendants jointly wrote the Certificate of Insurance. Therefore, even the alleged misrepresentation regarding the ability to deduct for usual and customary charges lacks the requisite degree of particularity.

Physicians Service Insurance Corporation. Plaintiffs have failed to plead their fraud claim with the particularity required by Fed. R. Civ. P. 9(b), warranting a dismissal of this claim.

IT IS THEREFORE ORDERED that Defendant Wisconsin Physicians Service Insurance Corporation's Motion to Dismiss Plaintiff's Third Amended Complaint (# 115) is GRANTED as to Plaintiffs' fraud claim and DENIED as to Plaintiffs' other claims; and Corporate Benefit Services of America, Inc.'s Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted (# 111) is GRANTED.

ORDERED this 10 day of APRIL, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RONALD L. MORRIS,)
)
Plaintiff,)
)
vs.) Case No. 99-CV-303-K
)
DEPARTMENT OF THE TREASURY,)
)
Defendant.)

O R D E R

Plaintiff filed the complaint in this case on April 23, 1999, alleging claims for violation of Title VII and the Age Discrimination in Employment Act. Since that time, plaintiff has filed six applications to extend time to file summons. The stated reason was that plaintiff was awaiting a final administrative decision as to an additional claim, which he wished to add to his complaint.

The first five applications were granted. The sixth was referred to Magistrate Judge Eagan. On March 2, 2000, she entered a minute order which granted plaintiff until March 31, 2000 to serve summons in this case, regardless of whether his last administrative complaint had been adjudicated. That date has passed, and the record does not reflect that plaintiff has yet served defendant.

In a matter of days, it will have been one year since the complaint was filed in this case. In view of the notice given to plaintiff, the Court will dismiss this action without prejudice.

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If plaintiff elects to refile, he should seek to promptly obtain service. Should an administrative proceeding make an additional charge appropriate, plaintiff may seek to file an amended complaint. The Court sees no point in having this case remain in limbo.

It is the Order of the Court that this action is hereby DISMISSED without prejudice.

IT IS SO ORDERED THIS 10 DAY OF APRIL, 2000.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KENT WHITEEAGLE, Individually and as Personal Representative of the Estate of SHARLA KAY WHITEEAGLE, deceased, and as Father and Next Friend of SAMANTHA WHITEEAGLE, a minor,	)	
Plaintiffs,	)	
v.	)	**Case No. 99-CV-0450-K (E)**
JOHN R. BUCKLES, Individually, BOA TRANSPORTATION, INC., an Illinois corporation, and HANOVER INSURANCE COMPANY, a New Hampshire corporation,	)	
Defendants.	)	

REPORT AND RECOMMENDATION

The Court referred to the undersigned the motion for expedited apportionment hearing (Docket #43) and the motion for proceeds from wrongful death action (Docket #49). The motion for expedited apportionment hearing was granted, and a hearing was set for March 24, 2000. On that date, the motion for proceeds was filed by Jolene Doss, the mother of decedent. At the March 24 hearing, Jolene Doss was present and represented by counsel. The apportionment hearing was commenced, and no party or claimant objected to the total settlement amount, the apportionments to the minor daughter of the decedent and the attorneys, and the conditional apportionment for medical and burial expenses. The undersigned took under advisement the legal issue regarding apportionment of the remainder as between the surviving spouse and Jolene Doss (see Docket #51). The surviving spouse filed a supplemental brief (Docket #54), and Jolene Doss filed a supplemental

brief (Docket #55), and a response to the surviving spouse's supplemental brief (Docket #56). The undersigned, having fully reviewed all of the briefs and authorities cited, recommends that the motion for proceeds from wrongful death action (Docket #49) be **DENIED**.

BACKGROUND

Based on representations of plaintiffs, the following events led to this apportionment issue:

On October 17, 1998, the decedent, Sharla Kaye WhiteEagle, and her daughter/plaintiff, Samantha WhiteEagle, were involved in a motor vehicle collision with a semi-tractor/trailer owned by defendant BOA Transportation and operated by defendant John R. Buckles. Both Sharla Kaye and Samantha suffered injuries as a result of the collision. The day of the accident, Samantha was treated and released from Miami Baptist Hospital while Sharla Kaye was transferred to Tulsa's St. Francis Hospital for more definitive treatment.

Two days following her admission, a surgeon attempted to repair Sharla Kaye's right knee and reconstruct her crushed pelvis. Sharla Kaye experienced a number of complications following the procedures. Most importantly, Sharla Kaye developed acute respiratory distress syndrome. Sharla Kaye then spent the next three weeks on respiratory support in the intensive care unit before dying on November 6, 1998.

At the time of her death, Sharla Kaye was 36 years old and in excellent health. She and Kent WhiteEagle ("Kent"), her surviving spouse, were married and lived together in Grove, Oklahoma raising their 12 year old daughter, Samantha. In addition to her role as Samantha's mother and running the WhiteEagle household, Sharla Kaye also worked as an assistant manager at a nearby cafeteria. Sharla Kaye earned an hourly wage ($6.75 per hour) at the time of her death.

On April 30, 1999, Kent was appointed Personal Representative in In the Matter of the Estate of Sharla Kaye WhiteEagle, P 99-57, in the District Court in and for Delaware County. Thereafter, on June 11, 1999, Kent brought this action on behalf of Samantha, himself, and Sharla Kaye's estate. The Complaint alleges a cause of action both for the wrongful death of Sharla Kaye and injuries sustained by Samantha as a result of defendants' negligence.

After seven months of pretrial investigation and discovery, plaintiffs and defendants reached an amicable settlement of all claims raised in the underlying Complaint. In exchange for a dismissal with prejudice, plaintiffs and defendants settled this matter for One Million Dollars ($1,000,000). Thereafter, attorney Phil Frasier was appointed Guardian of Samantha WhiteEagle, in Case No. PG-2000-12, in the District Court in and for Delaware County, in anticipation of proceeds of the settlement and in accordance with OKLA. STAT. tit. 30, § 2-101, et seq.

As set forth below, OKLA. STAT. tit. 12, § 1053, Oklahoma's wrongful death statute, specifically authorizes the Court to apportion the settlement proceeds herein. The apportionments not objected to and the balance are as follows:

Settlement Proceeds	$1,000,000.00
Samantha WhiteEagle	- 350,000.00
Attorneys Fees	- 343,531.68
Medical/Burial Expenses (conditional)	- 75,000.00[1]
Balance (conditional)	$ 231,468.32

[1] The undersigned conditionally approved this amount so that plaintiffs' counsel could attempt to resolve expeditiously the outstanding bills and liens. If these expenses are settled for less than $75,000, the overage will increase the balance to be apportioned; if these expenses are settled for more than $75,000, the balance will be reduced.

The surviving spouse, Kent WhiteEagle, and the decedent's mother, Jolene Doss, each make claim to the balance, although Jolene Doss claims only $100,000. (See Docket #49, at 2).

REVIEW

Jolene Doss argues that the plain language of OKLA. STAT. tit. 12, § 1053 gives her an unqualified right to make a claim for her grief and loss of companionship arising from the wrongful death of her emancipated, adult child even though the child's spouse and minor child survived. Accordingly, she contends that she is entitled to a portion of the remaining settlement proceeds. The statute provides, in relevant part:

> B. The damages recoverable in actions for wrongful death as provided in this section shall include the following: Medical and burial expenses, which shall be distributed to the person or governmental agency as defined in Section 200 of Title 56 of the Oklahoma Statues, who paid these expenses, or to the decedent's estate if paid by the estate.
>
> The loss of consortium and the grief of the surviving spouse, which shall be distributed to the surviving spouse.
>
> The mental pain and anguish suffered by the decedent, which shall be distributed to the surviving spouse and children, if any, or next of kin in the same proportion as personal property of the decedent.
>
> The pecuniary loss to the survivors based upon properly admissible evidence with regard thereto including, but not limited to, the age, occupation, earning capacity, health habits, and probable duration of the decedent's life, which must inure to the exclusive benefit of the surviving spouse and children, if any, or next of kin, and shall be distributed to them according to their pecuniary loss.
>
> The grief and loss of companionship of the children and parents of the decedent, which shall be distributed to them according to their grief and loss of companionship.

OKLA. STAT. tit. 12, § 1053.

As set forth above, the parties have stipulated to an amount for Samantha, which represents her damages, plus her share of the mental pain and anguish suffered by the decedent, her pecuniary loss, and her grief and loss of companionship. The issue then is whether Kent, as the surviving

spouse, receives the remainder for his loss of consortium and grief, his share of the mental pain and anguish suffered by the decedent, and his pecuniary loss, or whether Jolene Doss, as Sharla Kaye's parent, receives some portion for her grief and loss of companionship as well.

Jolene Doss points out that the statute was amended in 1979 to add the second and fifth categories of recoverable damages, *i.e.*, loss of consortium and grief of a surviving spouse and loss of companionship and grief of the children and parents of the decedent. See Superior Supply Company, Inc. v. Torres, 900 P.2d 1005, 1008 (Okla. Ct. App. 1995); Estate of Lovely, 848 P.2d 51, 53-54 (Okla. Ct. App. 1993). While it would appear that the statute gives both spouse and parent a right to recover, the undersigned does not review the statute in a vacuum. Jolene Doss cites Estate of Lovely and Superior Supply for support of her claim to damages, but neither of these cases addressed factual situations that involved a surviving spouse.

Plaintiffs cite Ouellette v. State Farm Mut. Auto. Ins. Co., 918 P.2d 1363 (Okla. 1994), for the proposition that parents are denied any part of the recovery where a spouse survives the decedent. The facts in Ouellette are distinguishable because the parents of the deceased adult child in Ouellette attempted to bring a wrongful death action three years after their child's spouse had settled a separate wrongful death action. However, in denying recovery to the parents, the Oklahoma Supreme Court specifically addressed the legal issue presented in this case and interpreted the statute to deny recovery to parents in the event the decedent is survived by a spouse or child at the time of death. Id. at 1366, 1369.

The Ouellette court noted that the statute permits a wrongful death claim to be brought only by the personal representative of the decedent. Here, Kent is the personal representative. Quoting from that portion of the statute which permits recovery for pecuniary loss, the Court noted that

"[r]ecovery must inure to the exclusive benefit of '*the surviving spouse and children, if any, or next of kin*'(§ 1053) (Emphasis supplied.)" 918 P.2d at 1366. The Court then reasoned by reference to the statute governing wills and succession (OKLA. STAT. tit. 84, § 213(B)(1) and (2)) that parents may not recover as "next of kin" if the decedent leaves a surviving spouse and a child or children. 918 P.2d at 1366. The Oklahoma Supreme Court stated:

> The last cited section [§ 213(B)(1) and (2)] provides that if the decedent **leave** a surviving spouse and a child or children, **the parents may not take as next of kin**. . . . **Only** when the parents are the decedent's next of kin may they press for "grief and loss of companionship" damages as an element of **their** authorized recovery.

Id. at 1367 (footnotes omitted) (emphasis in original). Then the Court, in addressing the Ouellette parents' claim for damages for their grief and loss of companionship occasioned by the death of their son, concluded:

> The wrongful-death statute [citation omitted] . . . affords this element of damages only to the children of the decedent and to the parents who are next of kin.

Id. at 1370 n. 34.

In Superior Supply a year later, the Oklahoma Court of Appeals pointed out that the Legislature deleted the phrase "to be distributed in the same manner as personal property of the deceased" from Section 1053 and added a new subsection which explains that the judge determines the proper division where recovery is to be distributed according to a person's pecuniary loss or loss of companionship. Okla. Stat. tit. 12, § 1053(D).[2] "This amended version changed the responsibility

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[2] The undersigned does not agree with plaintiffs' argument that the language of this subsection permits only one person to recover. (See Pl. Supp. Br., Docket # 54, at 3.) If that were true, only one child among siblings could recover, and only one parent could recover if two parents survived an unmarried child with no issue.

for division of damages for pecuniary loss and loss of companionship in wrongful death actions from the jury to the trial court and eliminated the division of wrongful death damages in accordance with Oklahoma intestate law." Superior Supply, 900 P.2d at 1008.

Thus, the Ouellette opinion is troubling because the Oklahoma Supreme Court reached its decision by reference to intestate law and because Jolene Doss is not attempting to recover pecuniary loss as next of kin. She is trying to recover damages for grief and loss of companionship as a parent. Nonetheless, the undersigned cannot overlook an Oklahoma Supreme Court decision specifically on point. The Ouellette court clearly held that parents seeking damages for their grief and loss of companionship occasioned by the death of their emancipated, adult child may recover only if they qualify as next of kin, and they cannot qualify if their child leaves a surviving spouse and a child or children. Ouellette, 918 P.2d at 1366, 1369.[3] The undersigned believes that this Court is constrained to follow this precedent unless or until the Ouellette decision is overruled or the Oklahoma legislature clarifies the statute.

Public policy concerns further support a decision not to permit recovery to the decedent's parent where the decedent leaves a surviving spouse and minor child. It would seem incompatible to permit recovery to parents of a child who dies a "wrongful" death where they could not inherit in the event the child died a "natural" death. Further, the undersigned believes a contrary result would encourage court battles between surviving spouses and in-laws in wrongful death actions.

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[3] The undersigned also disagrees with plaintiff's argument that the section providing for grief and loss of companionship places Jolene Doss and Samantha WhiteEagle in direct competition for any award of grief and loss of companionship. (See Pl. Supp. Br., Docket # 54, at 2.) Section 1053(B) provides that grief and loss of companionship are recoverable damages "of the children *and* parents of the decedent," not "children *or* parents of the decedent." See OKLA. STAT. tit. 12, § 1053(B) (emphasis supplied).

Despite these policy concerns, the undersigned cannot agree with plaintiff's attempt to value the respective loss to the spouse, parent, and child as a result of Sharla Kaye's death. (See Pl. Supp. Br., Docket # 54, at 4-7.) While the significance of Kent's loss should not be belittled, and the loss to Samantha is immeasurable, the loss to Jolene Doss cannot be underestimated. Unfortunately for Jolene Doss, the current state of Oklahoma law does not permit that loss to be calculated in monetary terms for her as the parent of a decedent who is survived by a husband and a child.

CONCLUSION

Based upon the foregoing, the undersigned recommends that the motion for proceeds from wrongful death action (Docket #49) be **DENIED**.

OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must file them with the Clerk of the District Court within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1); see also Fed. R. Civ. P. 72(b). **The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court.** See Thomas v. Arn, 474 U.S. 140 (1985); Haney v. Addison, 175 F.3d 1217 (10th Cir. 1999).

DATED this 11th day of April, 2000.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

e undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 12th Day of April, 2000.

L Portillo, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

In Re:	)	
	)	
GARY L. KING and THELMA F. KING,	)	**Bankruptcy Case No. 98-00162-R Chapter 13**
	)	
Debtors.	)	
	)	
DPW EMPLOYEES CREDIT UNION,	)	
	)	
Appellant,	)	
	)	
v.	)	**Case No. 99-CV-672-K (J)**
	)	
GARY L. KING and THELMA F. KING,	)	
	)	
Appellees.	)	

ORDER

There has been no objection to the Magistrate Judge's Report and Recommendation filed March 21, 2000 (# 6). Having conducted an independent review, the Court adopts this Report and Recommendation as the Order of the Court, finding that the decision of the bankruptcy court should be affirmed as to its findings that (1) the travel loan amounts are secured only by the reimbursement money and (2) the debtor's objection to DPW Employees Credit Union's ("Credit Union's") proof of claim was procedurally tantamount to an adversary proceeding and should be reversed as to its findings that (1) the line of credit advances were not secured by the two automobiles, because the future advances clauses of the parties' security agreements did not apply to those advances; (2) Credit Union's April 10, 1998, proof of claim was not adequately documented and, therefore, was not *prima facie*

evidence of the validity and amount of Credit Union's secured claim, pursuant to Fed. R. Bankr. P. 3001; and (3) because Credit Union did not object to the confirmation of the Debtor's amended plan, that plan "provided for" Credit Union's line of credit claim by deeming that claim to be unsecured.

IT IS THEREFORE ORDERED that the decision of the bankruptcy court is AFFIRMED IN PART and REVERSED IN PART and the case is REMANDED to the Bankruptcy Court for further proceedings consistent with the incorporated Magistrate Judge's Report and Recommendation, pursuant to Fed. R. Bankr. P. 8013.

ORDERED THIS 10 DAY OF APRIL, 2000.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 12 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 00CV0107B(E)
	)	
MARK A. DUNN,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET

DATE APR 12 2000

DEFAULT JUDGMENT

This matter comes on for consideration this 12th day of Apr., 2000, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Mark A. Dunn, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Mark A. Dunn, was served with Summons and Complaint on February 7, 2000. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Mark A. Dunn, for the principal amount of $4,883.49, plus accrued interest

of $1,158.79, plus interest thereafter at the rate of 9 percent per annum until judgment, plus filing fees in the amount of $150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 6.197 percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

PHIL PINNELL, OBA # 7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918)581-7463

PEP/llf

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 96-C-758-E
	)	
ONE PARCEL OF REAL PROPERTY KNOWN AS: 16328 SOUTH 43rd WEST AVENUE, BIXBY, TULSA COUNTY, OKLAHOMA AND ALL BUILDINGS, APPURTENANCES, AND IMPROVEMENTS THEREON,	)	
	)	
Defendant.	)	

ORDER

Now before the Court is the Motion For Summary Judgment (Docket #33) of the Plaintiff, United States of America.

The United States contends that the above-described property is subject to forfeiture pursuant to 21 U.S.C. §881(a)(7) because it was used or intended to be used to commit or to facilitate the commission of a violation of the drug prevention and control laws of the United States. Claimant, Ozella Scott, owns the land and half interest in the mobile home on the land. Her son, Mark Alan Scott, who resided on the property, has stipulated to forfeiture of his interest in the property and the improvements thereon. Moreover, Mark Alan Scott has admitted that he grew marijuana on the property with the intent to distribute the marijuana

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to other persons. The sole issue in this motion for summary judgment is whether Ozella Scott is an "innocent owner" for the purposes of this forfeiture proceeding.

Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, the court stated:

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

A recent Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

> Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."
>
> * * *
>
> A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Id. at 1521.

Forfeiture is authorized, pursuant to 21 U.S.C. §881(a)(7) for property described as follows:

> All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission or , a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that

owner.

Ozella Scott has conceded that probable cause existed for forfeiture, and in fact, it is undisputed that the property at issue was connected to a violation of the narcotics laws. The only defense advanced by Ozella Scott is that of "innocent owner." The innocent ownership defense requires a showing that (1) claimant was not involved in the wrongful activity; (2) the claimant was not aware of the wrongful activity; and (3) the claimant had done all that reasonably could be expected to prevent the proscribed use of the property. Calero-Toledo v. Peason Yacht Leasing Co., 416 U.S. 663, 689-90 (1974). The government argues that since Ozella Scott continued to allow Mark Alan Scott to occupy the property despite her knowledge that marijuana had been grown there, and because she failed to take any steps to prevent the illegal use, the innocent ownership defense is not available to her. Mrs. Scott argues that her telling Mark Scott that she "didn't appreciate," him growing marijuana on the property, that she "did not want to find anymore out there," and that she didn't want mraijuana on her property and didn't want him using it are sufficient to raise a question of fact as to whether she "had done all that reasonably could be expected to prevent the proscribed use of the property."

Ozella Scott made the following statement in conjunction with the investigation of her son:

> My name is Ozella Eunice Scott. I was born 8-22-33 . Present age 63. I live at 5905 N. Lewis, Tulsa, Ok. Today I voluntarily came to F.B.I. office in tulsa (sic) to take a polygraph test after taking the test I was told I had

problems with the question, before Mark's arrest did I know he was growing marijuana on property in Bixby.

I did know he grew one plant in old toilet by shop the plant was 12" to 15" high, this was before his arrest at least 2 years. I sprayed it with weed killer and killed it. About a week later he told me it was his. I let him know how angry I was. About a year before arrest I found seeds I believe were marijuana, wife and daughter were there, I said I hope you two aren't smoking in front of daughter, I was very angry with them. I know Mark smoked marijuana, I didn't know how much, since arrest I heard he smoked quite a lot. His lawyer told me, he said Mark told him.

I found roach (marijuana cig.) In trailer in kitchen in last (sic) 80, ask Mark if it was his, his friend Pete said it was his. Also in late 80 my nephew Rusty Chanault has a trailer parked on property with Mark, one day when I was there I saw one marijuana plant through back window of Rusty trailer, I didn't say anything to them this time. Had told both of them not to grow marijuana on my property. I had been told they had grown marijuana other places.

Before Mark got divorce from Laura, they would get in fights and she would tell me Mark was growing marijuana on my property and smoking it. I never saw it and I never went looking for it.

Therefore, by Ms. Scott's own testimony, all she did to prevent the illegal use of the property was to tell her son not to grow it on her property, but she was aware of marijuana on her property after she told him not to grow it there. Moreover, she specifically stated that she "never went looking for" the marijuana, and it is undisputed that she allowed her son to continue living on the property even after finding marijuana there. The Court finds that Mrs. Scott's statements to her son and spraying weedkiller on a plant one time (another time she did not do anything) are insufficient to raise a question of fact as to whether she "had done all that reasonably could be expected to prevent the proscribed use of the property."

The government's Motion For Summary Judgment (docket #33) is granted.

IT IS SO ORDERED THIS 5th DAY OF APRIL, 2000.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BETTY A. BETTS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 99-CV-0570-BU(J)**
	)	
HUME LEATHER, INC., an Oklahoma corporation,	)	
	)	
	)	
Defendant.	)	

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1)(ii), the Plaintiff, Betty A. Betts, and Defendant, Don Hume Leathergoods, Inc., hereby stipulate that the above-styled cause is dismissed with prejudice, and Plaintiff agrees that all rights, causes of action, claims or other proceedings which she may have, known or unknown, asserted or unasserted, against Defendant are dismissed with prejudice. The Plaintiff stipulates that all claims or causes of action which she may have against Defendant, as well as against any and all supervisors, employees, or agents of Defendant, are released and dismissed with prejudice.

Respectfully submitted,

Karen Goins, OBA #
Jeri Jones, OBA #
Stipe Law Firm
P. O. Box 701110
Tulsa, OK 74170
ATTORNEYS FOR PLAINTIFF

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-and-

Coy D. Morrow, OBA # 6443
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MORROW, WILSON, WATSON & JAMES
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P. O. Box 1168
Miami, OK 74355
Tel: 918-542-5501
Fax: 918-542-5400

**ATTORNEYS FOR DEFENDANT,
DON HUME LEATHERGOODS, INC.**

CERTIFICATE OF SERVICE PER F.R.C.P. 5

I hereby certify that on the 10 day of April, 2000, I caused a true and correct copy of the above and foregoing to be delivered in a manner allowed by F.R.C.P. 5 to the following:

Karen Goins, Esq.
Jeri Jones, Esq.
Stipe Law Firm
P. O. Box 701110
Tulsa, OK 74170

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RANDY & CATHERINE MARTIN, as parents and next friend of their minor daughter, BRANDY MARTIN, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 98-CV-416-H
INDEPENDENT SCHOOL DISTRICT NO. 8 OF TULSA COUNTY, a/k/a SPERRY PUBLIC SCHOOLS, *et al.*,	)	**CLASS ACTION**
Defendants.	)	

JUDGMENT

In accordance with the order filed on March 20, 2000, awarding Plaintiffs attorney fees and litigation expenses,

IT IS THEREFORE ORDERED that the Plaintiffs recover from the Defendants the sum of $32,873.01, with post-judgment interest thereon at the rate of 6.197 percent as provided by law.

ORDERED this 10th day of April, 2000.

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

APPROVED :

Samuel J. Schiller, OBA #016067
Ray Yasser, OBA #009944
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(918) 585-9211
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BONNIE BRASWELL,)
)
Plaintiff,)
)
v.) CASE NO. 99-CV-436-M
)
KENNETH S. APFEL,)
Commissioner of the Social Security)
Administration,)
)
Defendant.)

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 11th day of April, 2000.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BONNIE BRASWELL,

Plaintiff,

vs.

KENNETH S. APFEL, COMMISSIONER, SOCIAL SECURITY ADMINISTRATION,

Defendant.

CASE NO. 99-CV-436-M

ORDER

IT IS ORDERED, ADJUDGED AND DECREED that this case be, and it is hereby remanded to the Defendant for further administrative action pursuant to sentence four (4) of §205(g) of the Social Security Act, 42 U.S.C. §405(g). *Melkonyan v. Sullivan*, 501 U.S. 89 (1991).

On remand, the Commissioner will assign the case to an administrative law judge for a supplemental hearing. The administrative law judge will reevaluate all of Plaintiff's impairments, including her obesity, under the revised regulations. The administrative law judge will apply the appropriate sequential evaluation steps in correct order under 20 C.F.R. §§ 404.1520(a) and 416.920(a).

THUS DONE AND SIGNED on this 11th day of April, 2000.

Frank H. McCarthy
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DONALD ROY ROGERS, JR.,)
)
Plaintiff,)
)
vs.)
)
LARRY FUGATE, Sheriff of Creek County; CREEK COUNTY,)
)
Defendants.)

ENTERED ON DOCKET
DATE APR 11 2000

No. 98-CV-173-H (M)

ORDER

Plaintiff, a state prisoner appearing *pro se* and proceeding *in forma pauperis*, brings this action pursuant to 42 U.S.C. § 1983, alleging that his civil rights were violated while he was a pretrial detainee at the Creek County Jail. Defendant Creek County has been dismissed by previous order (Docket #10). Defendant Larry Fugate, Sheriff of Creek County, has moved to dismiss (Docket #13) for failure to state a claim upon which relief can be granted. Defendant Fugate has also provided a court-ordered Special Report. See Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978); Worley v. Sharp, 724 F.2d 862 (10th Cir. 1983). For the reasons stated below, the Court concludes that Defendant's motion to dismiss should be granted. As a result of today's ruling, Plaintiff's motion to grant relief (Docket #16) has been rendered moot.

BACKGROUND

Plaintiff was incarcerated at the Creek County Jail from October 3, 1997, through approximately May of 1999.[1] In his amended complaint (#7), Plaintiff identifies three claims as follows:

[1]The Court received a notice of change of address from Plaintiff on May 28, 1999, indicating his transfer from the Creek County Jail to the Lexington Assessment and Reception Center.

Count I: Overcrowding

They had seven men in a 6X12 cell. No mattress or blanket. I am one.

Count II: No medical attition (sic)/was forced to remove own stiches (sic). Have not been able to have further check-up of left hilum. Have headack (sic) and ear drainage.

No medical staff hired by sheriff or Creek County.

Count III: Food

One item on plate. Not a ballanced (sic) meal.

(#7 at 6). In his request for relief, Plaintiff asks for "my release from and Creek Co. Jail condemnation, 500.00 dollars for mental anguish and physcial (sic) anguish/ ballanced (sic) meals, living space, medical attition (sic) staff." (#7 at 8).

ANALYSIS

A. Plaintiff's requested relief

As an initial matter, the Court finds that certain aspects of the relief requested by Plaintiff are either improper in a § 1983 action or are now moot as a result of his transfer from Creek County Jail. Specifically, Plaintiff's request that he be released from the Creek County Jail due to the conditions of confinement he was forced to endure cannot be granted in a § 1983 action. A request for release from detention must be brought in a habeas corpus action. Addressing the distinctions between habeas corpus petitions and § 1983 actions, the Supreme Court has held that "habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release, even though such a claim may come within the literal terms of § 1983." Heck v. Humphrey, 512 U.S. 477, 481 (1994) (citing Preiser v. Rodriguez, 411 U.S. 475, 488-90 (1973)). By contrast, a § 1983 action is typically the proper vehicle for attacking

unconstitutional conditions of confinement and parole procedures. See Preiser, 411 U.S. at 498-99. Thus, while Plaintiff's challenges to the conditions of his confinement at the Creek County Jail are properly brought in this § 1983 action, his request to be released from confinement is an improper request and can only be brought in a habeas corpus action.

In addition, because Plaintiff has since been convicted and is now incarcerated in an Oklahoma Department of Corrections facility, he is no longer incarcerated at Creek County Jail. He does not allege that he is likely to return to Creek County Jail. As a result, his requests for condemnation of the Creek County Jail, for balanced meals, for increased living space, and for medical attention to be provided by "staff" have been rendered moot. See Weinstein v. Bradford, 423 U.S. 147, 149 (1975); Murphy v. Hunt, 455 U.S. 478, 481 (1982). Plaintiff no longer has any present interest affected by the alleged overcrowding and nutritionally deficient meals served at the Creek County Jail.

The only determination remaining in this case is whether Plaintiff's amended complaint sufficiently states a claim for is entitlement to damages for injury to him in violation of his right to adequate medical care.

B. Standard of Review

The purpose of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the case. A defendant must meet a high standard to have a complaint dismissed for failure to state a claim upon which relief may be granted. In fact, in ruling on a motion to dismiss, the Court must construe the complaint's allegations in the light most favorable to the plaintiff and take as true all well-pleaded facts and allegations in the plaintiff's complaint. Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991); Meade v. Grubbs, 841

F.2d at 1512. The allegations of a complaint should be construed liberally and a complaint should not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Meade, 841 F.2d at 1512 (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)).

When reviewing a *pro se* complaint, as in this case, the Court must employ standards less stringent than if the complaint had been drafted by counsel. Haines v. Kerner, 404 U.S. 519, 520-21 (1972). However, in order to withstand a motion to dismiss, a complaint must allege facts sufficiently setting forth the essential elements of the cause of action. Gray v. County of Dane, 854 F.2d 179, 182 (7th Cir.1988). The Court notes that by Order filed April 10, 1998 (#5), Plaintiff was afforded the opportunity to amend his original complaint to avoid dismissal for failure to state a claim. Plaintiff did submit the amended complaint presently before the Court (#7). However, as discussed below, the amended complaint nonetheless fails to state a claim against Defendant Fugate in either his individual capacity or his official capacity as Sheriff of Creek County.

C. Claims against Larry Fugate in his individual capacity

In the context of civil rights claims against government officials, it is well established that a defendant may not be held individually liable under section 1983 unless the defendant caused or participated in the alleged constitutional deprivation. Housley v. Dodson, 41 F.3d 597, 600 (10th Cir. 1994). Mere supervisory status, without more, will not create liability in a Section 1983 action. Ruark v. Solano, 928 F.2d 947, 950 (10th Cir. 1991). The Tenth Circuit standard for supervisory liability under § 1983 is stated in Woodward v. City of Worland, 977 F.2d 1392 (10th Cir.1992). Johnson v. Martin, 195 F.3d 1208, 1219 (10th Cir. 1999). According to Woodward, supervisor

liability requires 'allegations of personal direction or of actual knowledge and acquiescence.' " Woodward, 977 F.2d at 1400 (quoting Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3d Cir.1990)). Under this standard, mere negligence is insufficient to establish supervisory liability. Id. at 1399. To state a claim against a supervisor, a plaintiff must allege facts which demonstrate the supervisor's personal involvement in the unconstitutional activities of his subordinates; at a minimum, the plaintiff must allege knowledge or "deliberate indifference" to the subordinates' actions. Volk v. Coler, 845 F.2d 1422, 1431 (7th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512, 1527-28 (10th Cir. 1988). In the present case, Defendant Fugate will be held individually liable only if, by his own conduct, he deprived the Plaintiff of any rights secured under the Constitution. See Rizzo v. Goode, 423 U.S. 362, 377 (1976); Duckworth v. Franzen, 780 F.2d 645, 650 (7th Cir.1985), cert. denied, 479 U.S. 816 (1986).

To the extent Plaintiff has alleged a claim against Defendant Fugate in his individual capacity, Plaintiff's claims are based on Defendant Fugate's role as supervisor. Plaintiff's allegations are that he was forced to remove his own stitches, that no follow-up care was provided, and that he had a headache and ear drainage. However, after liberally construing Plaintiff's complaint, the Court finds that the Plaintiff has failed to assert an affirmative link to establish that Defendant Fugate, by his own conduct, caused or participated in any alleged constitutional violations related to his claims. Absent the requisite nexus between the alleged deprivation and Defendant's involvement, the Court finds Plaintiff has failed to state a claim against Defendant Fugate in his individual capacity and those claims must be dismissed.

Furthermore, to the extent Plaintiff alleges claims related to the medical care he received while incarcerated at Creek County Jail, his claims fail since they do not rise to the level of a Fourteenth Amendment violation. Plaintiff's claims must be judged against the "deliberate

indifference to serious medical needs" test as set out in Estelle v. Gamble, 429 U.S. 97 (1976); see also Martin, 909 F.2d at 406. That test has two components: an objective component requiring that the pain or deprivation be sufficiently serious; and a subjective component requiring that the offending officials act with a sufficiently culpable state of mind. Wilson v. Seiter, 501 U.S. 294, 298-99 (1991). Neither negligence nor gross negligence satisfies the deliberate indifference standard required for a violation of the Eighth or Fourteenth Amendments. Estelle, 429 U.S. at 104-05; Ramos v. Lam, 639 F.2d 559, 575 (10th Cir. 1980). In this case, none of Plaintiff's claims rises to the level of a constitutional violation. Even assuming Plaintiff's allegations are true, the Court concludes Plaintiff has not alleged he sustained substantial harm or suffered "a serious medical need" as a result of these incidents, nor has he alleged that Defendant Fugate acted with the requisite culpable state of mind. Therefore, Plaintiff has failed to allege facts in support of either prong of the Estelle standard. At best, Plaintiff's complaint states a claim for negligence on the part of jail officials. Negligence alone, however, is insufficient to establish a constitutional violation. Davidson v. Cannon, 474 U.S. 344, 347 (1986).

D. Claims against Larry Fugate in his official capacity as Sheriff of Creek County

Plaintiff has also failed to state a claim against Sheriff Fugate in his official capacity as Sheriff of Creek County. For purposes of liability, a suit against a public official in his official capacity is in effect a suit against the local government entity he represents. Kentucky Bureau of State Police v. Graham, 473 U.S. 159, 165-166 (1985). Thus, Plaintiff's claims against Defendant Fugate in his official capacity as Sheriff of Creek County, are treated as claims against the governmental entity--Creek County. In order to state a claim against a municipality under section 1983, a plaintiff must show that the municipality itself, through custom or policy, caused the alleged

constitutional violation. Monell v. Dept. of Social Servs., 436 U.S. 658 (1978). There are two requirements for liability based on custom: (1) the custom must be attributable to the county through actual or constructive knowledge on the part of the policy-making officials; and (2) the custom must have been the cause of and the moving force behind the constitutional deprivation. Respondeat superior does not give rise to a section 1983 claim. Monell, 436 U.S. at 692-94; see also City of Canton v. Harris, 489 U.S. 378, 385 (1989).

After liberally construing the allegations in the complaint in the light most favorable to Plaintiff, Haines v. Kerner, 404 U.S. 519, 520 (1972), the Court concludes that Plaintiff has failed to allege a custom or policy of deliberate indifference toward pretrial detainees at the jail. Nor has Plaintiff alleged any facts supporting his claim that Creek County was grossly negligent in failing to train and supervise Creek County Jail Officials. See #16 at 2. Plaintiff's claim is not that the County failed or refused to provide medical care to the detainees incarcerated at the Jail. Instead, he complains that the County did not hire a separate "medical staff" to provide medical care at the Jail. Taking the facts pled in the amended complaint, as well as Plaintiff's allegations in his response (#16) as true, the Court finds that Plaintiff has not alleged an unconstitutional policy attributable to a municipal policymaker, sufficient to progress past the pleading stage. See Oklahoma City v. Tuttle, 471 U.S. 808, 823-24 (1985) (plurality opinion) (single incident of unconstitutional activity not sufficient for municipal liability unless incident includes proof that it was caused by existing unconstitutional policy attributable to municipal policymaker). As a result, Plaintiff has failed to state a claim against Defendant Fugate in his official capacity as Sheriff of Creek County.

CONCLUSION

After liberally construing Plaintiff's complaint, the Court concludes that Defendant's motion to dismiss for failure to state a claim should be granted with regard to Plaintiff's claim for damages resulting from the denial of adequate medical care while he was incarcerated at Creek County Jail. The remainder of Plaintiff's requested relief is improper in a § 1983 action or has been rendered moot by his transfer to an Oklahoma Department of Corrections facility.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Defendant's motion to dismiss for failure to state a claim (doc. #13) is **granted** as to Plaintiff's request for damages resulting from the denial of adequate medical care at Creek County Jail.

(2) The remainder of Plaintiff's requested relief has been rendered **moot**.

(3) Plaintiff's motion to grant relief (#16) has been rendered **moot**.

(4) This is a final order terminating this action.

IT IS SO ORDERED.

This 10TH day of April, 2000.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

O'DELL L. BROWN,)
)
Petitioner,)
)
vs.) Case No. 97-CV-266-H
)
STEVE HARGETT,)
)
Respondent.)

JUDGMENT

This matter came before the Court upon Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

IT IS SO ORDERED.

This 10TH day of APRIL, 2000.

Sven Erik Holmes
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

O'DELL L. BROWN,)
)
Petitioner,)
)
vs.) Case No. 97-CV-266-H
)
STEVE HARGETT,)
)
Respondent.)

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, an inmate in custody of the Oklahoma Department of Corrections, challenges his convictions in Tulsa County District Court, Case Nos. CF-89-5493 and CF-90-667. Respondent has filed a Rule 5 response to the petition (#9) to which Petitioner has replied (#11). Petitioner also filed a Supplement to his reply (#10). For the reasons discussed below, the Court concludes that this petition should be denied.

BACKGROUND

On April 9, 1990, Petitioner entered a plea of guilty to both Murder in the First Degree, Case No. CF-89-5493, and Possession of a Firearm After Former Conviction of a Felony, Case No. CF-90-667. Petitioner was sentenced to life imprisonment and to twenty (20) years, to run concurrently, on the two convictions, respectively. Throughout the criminal proceedings in state district court, Petitioner was represented by court-appointed counsel from the Tulsa County Public Defender's Office. Petitioner did not move to withdraw his guilty plea and otherwise failed to perfect a direct appeal.

On May 26, 1992, Petitioner filed an application for post-conviction relief as to his murder

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conviction, Case No. CF-89-5493, requesting an appeal out of time. Petitioner raised the following claims of error:

1. His attorney did not file a motion to withdraw plea as petitioner had requested in a letter written by petitioner after he was received into the Department of Corrections.

2. Petitioner was denied an appeal through no fault of his own when he alleges his retained counsel failed to file a motion to withdraw plea of guilty.

3. Petitioner alleges his attorney told him he would receive a sentence of four (4) years on a reduced charge.

(See #9, attachment to Ex. B). The trial court denied Petitioner's request on June 17, 1992. Petitioner did not perfect an appeal in the Oklahoma Court of Criminal Appeals ("OCCA").

On October 21, 1991, Petitioner filed an application for post-conviction relief in Case No. CF-90-667, requesting an appeal out of time. The state district court denied the application and Petitioner did not perfect an appeal in the OCCA.

Petitioner filed his second application for post-conviction relief as to his murder conviction on June 6, 1994, requesting that he be allowed to appeal the denial of his first application for post-conviction relief out of time. The trial court denied relief on June 16, 1994 (#9, attachment to Ex. A) and the OCCA affirmed the denial on September 14, 1994. (#9, Ex. A).

Petitioner filed his second application for post-conviction relief as to his possession of a firearm conviction and his third application for post-conviction relief as to his murder conviction in one application filed in the trial court alleging as follows:

1. He was denied due process due to an intervening change in the law, when the United Stats Supreme Court in Cooper v. Oklahoma, 116 S.Ct. 1373 (1996), [found] the burden of proof in a competency hearing unconstitutional;

2. He suffered ineffective assistance of counsel;

3. That he was denied due process by not being indicted by grand jury;

4. That both the Court of Criminal Appeals and the trial court improperly dismissed his previous applications for post-conviction relief;

5. That the trial court lacked jurisdiction and Petitioner's convictions were improperly enhanced.

(see #9, Ex. C). On August 29, 1996, the state trial court denied the requested relief. As to Petitioner's Cooper claim, the trial court stated that "[u]nlike the litigant in *Cooper*, petitioner neither requested nor invoked Oklahoma's competency procedures, did not undergo a post-examination competency hearing, and therefore is not entitled to the relief provided in the above case precedent." Thus, the intervening change in law represented by Cooper was inapplicable to Petitioner and could not serve as "sufficient reason" to excuse his procedural default. The trial court also found that the remainder of Petitioner's claims were barred as the result of his procedural defaults and his failure to give "sufficient reason" for his defaults. Petitioner appealed the denial of post-conviction relief to the Oklahoma Court of Criminal Appeals ("OCCA"). On February 19, 1997, the OCCA affirmed the denial of post-conviction relief. (#9, Ex. D.) The OCCA also denied Petitioner's request for habeas corpus relief, stating that he had failed to demonstrate that he was entitled to immediate release and that he had been denied habeas corpus relief in the district court prior to filing in the OCCA.

Petitioner filed the instant petition for writ of habeas corpus on March 24, 1997, asserting the following three (3) propositions of error:

1. Denial of due process and ineffective assistance of counsel; denial of equal protection of law; change in law.

   Prior post-convictions and appeals were denied by procedural bar that has been removed by new law and a change in law; no equal protection or due process was allowed in prior post-convictions or appeals. Trial court did not have subject matter jurisdiction and counsel was ineffective, new holdings of law establish this undisputed fact.

2. Denied right to grand jury; no mental competency hearing held when court knew defendant was not competent; court errored in failing to provide attorney for appeal.

Court refused to allow a hearing; state confessed grounds raised as true; court denied

3. New holdings of law removing prior proceadural (sic) bar to innefective (sic) assistance of counsel claims.

(#1). Petitioner provides a supporting brief (#2) referenced in his petition. However, Petitioner completely fails to support his claims with any evidence or statement of relevant facts. Furthermore, the legal argument contained in the brief is, for the most part, incoherent and appears largely unrelated to Petitioner's claims.[1] In response to the petition, Respondent argues that each of Petitioner's claims is procedurally barred as the result of Petitioner's failure to perfect a direct appeal and post-conviction appeals following the trial court's denial of his first applications. In reply to Respondent's procedural bar defense, Petitioner appears to assert only that his claims of ineffective assistance of counsel cannot be procedurally barred.

ANALYSIS

A. Exhaustion/Evidentiary Hearing

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Respondent concedes, and this Court finds, that the Petitioner meets the exhaustion requirements under the law.

The Court also finds that an evidentiary hearing is not necessary as Petitioner has not met

[1]After reviewing a similar brief filed by Petitioner on post-conviction appeal, the OCCA noted that Petitioner's brief "is for the most part an indecipherable rambling of what may be loosely characterized as 'legal arguments' which have apparently been lifted out of context from the pleadings of other inmates." (#9, Ex. D at 2, February 19, 1997 Order affirming the denial of post-conviction relief).

his burden of proving entitlement to an evidentiary hearing. See Miller v. Champion, 161 F.3d 1249 (10th Cir. 1998). In denying Petitioner's application for post-conviction relief, the state trial court stated that "the matter under consideration does not present any genuine issue of material fact requiring a formal hearing with the presentation of witnesses and the taking of testimony." Thus, the state court denied an evidentiary hearing on Petitioner's claims and he shall not be deemed to have "failed to develop the factual basis of a claim in state court." Id. Therefore, his request is governed by pre-AEDPA standards rather than by 28 U.S.C. § 2254(e)(2). Id. Under pre-AEDPA standards, in order to be entitled to an evidentiary hearing, Petitioner must make allegations which, if proven true and "not contravened by the existing factual record, would entitle him to habeas relief." Id. In this case, Petitioner has not made allegations which, if proven true, "would entitle him to habeas relief." Therefore, the Court finds that an evidentiary hearing is not necessary.

B. Procedural Bar

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S.Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast majority of cases.'" Id. (quoting Andrews v. Deland, 943 F.2d

1162, 1190 (10th Cir. 1991), cert. denied, 502 U.S. 1110 (1992)).

Respondent argues that Petitioner procedurally defaulted these claims when he failed to withdraw his plea of guilty and otherwise perfect a direct appeal and when he failed to perfect post-conviction appeals following the state district court's denial of his first applications for post-conviction relief. In affirming the trial court's denial of post-conviction relief, the OCCA affirmed the trial court's finding that Petitioner had waived his claims by failing to raise them in a direct appeal or in prior post-conviction applications as required by Oklahoma procedural rules and that he had failed to provide the court sufficient reason for his failure to raise his claims in prior proceedings. (#9, Ex. D.)

1. Petitioner's claims, excluding substantive competency claim, are procedurally barred

Applying the principles of procedural default to the instant case, the Court concludes that with the exception of any substantive competency claim, Petitioner's claims are procedurally barred. Petitioner's ineffective assistance of counsel claims and his competency claims are discussed separately, in parts 2 and 3 below. The state court's procedural bar as applied to the remainder of Petitioner's claims was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the OCCA has consistently declines to review claims which could have been but were not raised on direct appeal or which could have been raised in a prior application for post-conviction relief. Okla. Stat. tit. 22, § 1086.

Because of his procedural default, this Court may not consider Petitioner's claims unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. The cause

standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

In his reply to Respondent's response, Petitioner argues only that his claims are not procedurally barred rather than attempting to show cause for his procedural default. Therefore, the Court concludes Petitioner has failed to demonstrate "cause" to excuse his procedural default.

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 506 U.S. 390, 403-404 (1993); Sawyer v. Whitley, 505 U.S. 333, 339-341 (1992). However, Petitioner does not allege that he is actually innocent of the crimes for which he was convicted. Therefore, the Court finds that the "fundamental miscarriage of justice" exception to the procedural default doctrine has no application to this case.

2. Petitioner's claims of ineffective assistance of counsel are procedurally barred

As to Petitioner's claims that he received ineffective assistance of counsel, the alleged procedural default cited by Respondent results from Petitioner's failure to raise the claim not only on direct appeal but also in an appeal from the denial of his first applications for post-conviction relief. When the underlying claim is ineffective assistance of counsel, the Tenth Circuit Court of

Appeals has recognized that countervailing concerns justify an exception to the general rule. Brecheen v. Reynolds, 41 F.3d 1343, 1363 (10th Cir. 1994) (citing Kimmelman v. Morrison, 477 U.S. 365 (1986)). The unique concerns are "dictated by the interplay of two factors: the need for additional fact-finding, along with the need to permit the petitioner to consult with separate counsel on appeal in order to obtain an objective assessment as to trial counsel's performance." Id. at 1364 (citing Osborn v. Shillinger, 861 F.2d 612, 623 (10th Cir. 1988)). The Tenth Circuit explicitly narrowed the circumstances requiring imposition of a procedural bar on ineffective assistance of counsel claims first raised collaterally in English v. Cody, 146 F.3d 1257 (10th Cir. 1998). In English, the circuit court concluded that:

> Kimmelman, Osborn, and Brecheen indicate that the Oklahoma bar will apply in those limited cases meeting the following two conditions: trial and appellate counsel differ; and the ineffectiveness claim can be resolved upon the trial record alone. All other ineffectiveness claims are procedurally barred only if Oklahoma's special appellate remand rule for ineffectiveness claims is adequately and evenhandedly applied.

Id. at 1264 (citation omitted).

After reviewing the record in the instant case in light of the factors identified in English, the Court concludes Petitioner's claims of ineffective assistance of counsel are procedurally barred. Because Petitioner did not perfect a direct appeal after pleading guilty, this Court would not be precluded from considering this claim on the merits had Petitioner raised the claim before the OCCA in an appeal from the denial of his first post-conviction action. See Miller v. Champion, 161 F.3d 1249 (10th Cir. 1998); English, 146 F.2d at 1264. However, Petitioner did not present his ineffective assistance of counsel claims to the OCCA in an appeal from the denial of his first post-conviction applications thereby defaulting his claims a second time. When Petitioner did raise ineffective assistance of counsel claims in his second and third applications for post-conviction

relief, the OCCA ruled that the claim had been waived as a result of Petitioner's failure to raise the claim in prior proceedings. That finding is an "independent" and "adequate" state procedural rule and this Court must recognize the default in this case.

Although Petitioner may overcome the procedural bar by demonstrating "cause and prejudice" to excuse the default or that a "fundamental miscarriage of justice" will occur if Petitioner's claim is not considered on the merits, Petitioner has failed to demonstrate "cause" sufficient to excuse his procedural default. Also, as discussed above, Petitioner does not claim to be actually innocent of the crimes for which he was convicted. Finding nothing in the record indicating the existence of "cause" for Petitioner's procedural default, the Court concludes that consideration of Petitioner's ineffective assistance of counsel claims is procedurally barred.

3. Petitioner's competency claim

In his second and third applications for post-conviction relief filed in the state district court, Petitioner alleged that an intervening change in law, Cooper v. Oklahoma, 517 U.S. 348, 369 (1996), justified entry of post-conviction relief in his case. In Cooper, the Supreme Court determined that the burden of proof placed on a criminal defendant in Oklahoma in a competency hearing was unconstitutional. However, in rejecting Petitioner's post-conviction Cooper claim, the state district court held that the holding in Cooper was inapplicable to Petitioner who had "neither requested nor invoked Oklahoma's competency procedures" during his criminal proceedings.

In the instant action, Petitioner alleges that "no mental competency hearing [was] held when court knew defendant was not competent." (#1 at 6). To the extent Petitioner has asserted a substantive competency claim, his claim is not subject to the imposition of a procedural bar. See Walker v. Attorney Gen. for State of Oklahoma, 167 F.3d 1339, 1344 (10th Cir. 1999). To establish

a substantive due process claim, a petitioner must show that he was, in fact, incompetent when he was tried or when he entered his plea. Id. "'[A] petitioner raising a substantive claim of incompetency is entitled to no presumption of incompetency and must demonstrate his or her incompetency by a preponderance of the evidence.'" Id. (quoting Medina v. Singletary, 59 F.3d 1095, 1106 (11th Cir. 1995)). However, in this case, Petitioner offers no affidavit or any other evidence supporting his bald allegation that the trial court knew he was incompetent when he entered his plea. Petitioner's allegation is in fact contradicted by the trial court's finding during post-conviction proceedings that Petitioner had neither requested nor invoked Oklahoma's competency procedures. Because Petitioner has made no showing that he was, in fact, incompetent to enter his guilty plea, the Court finds that any substantive competency claim fails and habeas corpus relief must be denied.

To the extent Petitioner has stated a procedural competency claim rather than a substantive due process claim, see Walker, 167 F.3d at 1343, the Court finds the claim to be subject to waiver and procedural bar. Id. at 1344. As stated above, the procedural bar imposed on Petitioner's claim was based on an "independent" and "adequate" state procedural ground. Coleman, 501 U.S. at 724. Furthermore, Petitioner has failed to demonstrate "cause" for the default or that failure to consider the claim will result in a fundamental miscarriage of justice. Therefore, this Court is prohibited from considering Petitioner's procedural competency claim. Id.

CONCLUSION

After carefully reviewing the record in this case, the Court concludes Petitioner has failed to demonstrate a substantive competency claim and that each of Petitioner's remaining claims is procedurally barred. As Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States, his petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is **denied.**

IT IS SO ORDERED.

This 10TH day of APRIL, 2000.

Sven Erik Holmes
United States District Judge